Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

In re, JOSEPH A. GENTILUOMO,
Petitioner,

BRUNSWICK BOWLING AND BILLIARDS CORPORATION
(Individually and doing business as Brunswick Technology Ventures), and as Quantum
and
COLUMBIA 300, INC.
(Individually and doing business as Track, Inc.),
and
PIN BREAKER INC.,
Respondents.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

(1) Where there is no other legal remedy left to resolve a critical legal issue, is the supervisory authority of the Supreme Court mandatory for determining if an Appeal Court's denial of a writ of mandamus was based on an inapplicable Supreme Court precedential case law, and further, whether the basis for such denial was intended to deceive the Petitioner into believing that his mandamus petition was inappropriate.

(2) Is it proper for Federal Courts to fail to perform a purely ministerial nondiscretionary act, specifically required by law to be performed in a prescribed manner in obedience to a mandate of legal authority.

(3) Is it proper for Appeal Courts to deny a petition for writ of mandamus, through an abuse of discretion, by unlawfully refraining from properly exercising their jurisdiction.

(4) Is it proper for Federal Courts to disregard established Supreme Court precedential case law, specifically enacted to adjudicate and resolve a specific legal issue.

(5) Is it proper for Federal Courts to disregard established Federal Court precedential case laws, specifically enacted to adjudicate and resolve a specific legal issue.

(6) Should there be a diversity of Federal Court legal opinions, when adjudicating identical issues, in different cases.

(7) Is it proper for Federal Courts to blatantly abuse their discretion, such as to inflict irreparable harm on an individual.

(8) Is it proper for Federal Courts to blatantly abuse their discretion, such as to wrongfully deprive an individual of his Constitutional Rights to a jury trial.

(9) When opposing parties both file motions for summary judgement, is it legally proper for Federal Courts to violate established legal precedent, and evaluate only one of the motions on the merits, and ignore consideration of the other motion.

(10) Does the Federal Rules of Civil Procedure give an Appeals Court the power to make factual findings, that were never made in District Court.

(11) When evaluating the patentability of a claimed invention, should all claim limitations, including functional and process limitations, be considered along with recited structural limitations.

(12) When considering summary judgment, is it mandatory for Federal Courts to abide to the Federal Rule of Civil Procedure 56(c), and always consider a party's "Statements of Uncontested Facts."

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:
Petitioner: Joseph A. Gentiluomo (Gentiluomo or Petitioner), an individual.

Respondents:

Respondent Brunswick Bowling and Billiard Corp. (Brunswick), a nongovernmental corporate party to the proceedings, and doing business as Brunswick Technology Ventures, and Quantum, is Brunswick Corporation, which is a publically held corporation that owns 10 percent or more of respondent's stock.

Respondent Columbia 300, Incorporated (Columbia) is a nongovernmental corporate party to the proceedings. Petitioner knows of no parent corporations to Columbia, and knows of no publically held companies which own 10 percent of more of Columbia's stock.

Respondent Track Incorporated (Track) is a nongovernmental corporate party to the proceedings. Petitioner knows of no parent corporations to Track, and knows of no publically held companies which own 10 percent or more of stock.

Respondent Pin Breaker, Inc. (Pin Breaker) is a nongovernmental corporate party to the proceedings. Petitioner knows of no parent corporations to Pin Breaker, and knows of no publically held companies which own 10 percent of more of Pin Breaker's stock.

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OPINIONS AND ORDERS ENTERED IN CASE

All opinions and orders entered by the United State Court of Appeals for the Federal Circuit were entered pursuant to Fed. Cir. Rule 47.6, and therefore not citable as precedent. They are public record.

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit issued its opinion and judgment on June 5, 2002, affirming-in-part and reversing-in-part the District Court's decision rendered November 1, 1999. A petition for rehearing was denied June 27, 2002. A petition for writ of mandamus was denied by an order dated May 1, 2003. The petitioner's request for reconsideration of his denied mandamus petition was denied by an order dated Oct. 2, 2003. Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C.§1651.

STATUTORY PROVISIONS INVOLVED

Graham v. John Deere, 383 U.S. 1 (1966)

Under 35 U.S.C.§103, scope and content of prior art are to be determined, difference between prior art and claims are to be ascertained, and level of ordinary skill in the pertinent art resolved. Against this background, obviousness of subject matter is determined. (383 U.S. 2, 17)

Patentability must be determined by consideration of subject matter sought to be patented taken as a whole. (383 U.S. 13).

McKay v. United States, 199F. 3d 1376, 1380 (1999)

When both parties move for summary judgment, each parties motion must be evaluated on its own merits, and all reasonable inferences must be resolved against the party whose motion is under consideration.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 9n.6 (1983) (Hereinafter Hospital v. Mercury)

Court of Appeals has no occasion to engage in extraordinary review by mandamus in aid of its jurisdiction, 28 U.S.C.§1651, when it can exercise the same review by a contemporaneous ordinary appeal.

28 U.S.C. § 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1338(a)

The district courts shall have original jurisdiction of any civil action arising under any act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection, and copyright cases.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 56(c), Motions and Proceedings Thereon

The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleading, dispositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

35 U.S.C. § 103(a)

A patent may not be obtained though the invention is not identically disclosed or described as put forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains.

STATEMENT OF THE CASE

A. Procedural History:

Joseph A. Gentiluomo (hereinafter "Petitioner") filed a complaint for patent infringement in the U.S. District Court, Northern District of New York on April 3, 1996. Jurisdiction of court is vested under 28 U.S.C. §§ 1331 and 1338(a).

The Petitioner filed in District Court, between January and March 1999, the following documents (D).

D1. Plaintiff's Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Opposition to Defendant Brunswick's Motion for Summary Judgment.

D2. Plaintiff's Statement of Uncontested Facts in Support of its Cross-Motion for Summary Judgment on Non-Obviousness.

D3. Plaintiff's Affidavit in Support of Summary Judgment Motion.

D4. Reply Affidavit of Joseph A. Gentiluomo in Further Support of Plaintiff's Motion for Summary Judgment.

D5. Plaintiff's Claims Chart.

The District Court's Memorandum-Decision and Order was entered on November 1, 1999, and its Final Judgment was entered on April 17, 2001, in Case No. 96-CV-544.

The Petitioner filed Appeal Brief No. 01-1364 in the U.S. Court of Appeals for the Federal Circuit on November 23, 2001. Jurisdiction of court is vested under 28 U.S.C. § 1295(a).

On June 5, 2002, the Court of Appeals entered its opinion and judgment, affirming-in-part and reversing-in-part the District Court's decision.

On June 12, 2002, the Petitioner filed a Rehearing Petition in the Appeals Court, which was denied on June 27, 2002.

The Petitioner's January 28, 2003 first submission of a petition for writ of mandamus was rejected as improper on February 4, 2003.

The Petitioner's March 12, 2003 second submission of a petition for writ of mandamus was rejected as improper on March 24, 2003.

The Petitioner's April 9, 2003 third submission of the writ of mandamus was considered and denied on May 1, 2003. (Misc. No. 731). Jurisdiction of the Court is vested under 28 U.S.C. § 1651.

The Petitioner filed a request for Rehearing of Mandamus Petition on May 12, 2003, which was denied on Oct. 2, 2003.

B. Argument:

The following material facts are presented for consideration, regarding the questions presented for review.

I. Petitioner's Disclosure On Appeal

The District Court failed to correctly resolve the factual teachings of the '614 patent and the cited prior art taken as a whole, failed to correctly ascertain whether there was a patentable difference between the cited prior art and the invention claimed in the '614 patent, and failed to ascertain the non-existence of genuine issues of material fact regarding Gentiluomo's cross-motion for summary judgment based on nonobviousness. Plaintiff's Appeal Brief at 3 (AB at 3).

Since the '614 patent teaches that the material specific gravity adjacent to the inner core can range from 1.195 to 0.38 (A118), the encapsulating mass will be classified as "variable density." Since the '614 patent teaches that the weight design-wise removed from the encapsulating mass of prior art balls is design-wise relocated within the inner core, such that the inner

core has a minimum specific gravity of 0.1063 or 0.1625 per pound of ball weight (A118), the inner core is classified as a "variable density or weight" inner core. Since the '614 patent teaches that the weight design-wise removed from the encapsulating mass is design-wise relocated within the inner core, ball weight remains fixed, and therefore classified as a fixed weight ball. (A114)

Since the prior art teaches that the inner core density or weight is varied in order to provide for different weight balls (A252-253; A268-269; A282, A283, A284) and the encapsulating mass fixed in density, the ball is classified as "variable weight." (A254-255) (AB at 4-6)

The claimed invention is nonobvious over the cited prior art, due to structural and functional differences. In Gentiluomo's patented invention, the magnitude of the density or weight of the inner core is dependent on the magnitude of the encapsulating mass specific gravity when varied between the claimed range of 1.195 to 0.38, for a specific fixed weight ball. In the cited prior art balls, the magnitude of the density or weight of the inner core is dependent solely on the weight of the ball desired, while the density of the encapsulating mass remains fixed (A268-269; A249-250; A255) (AB at 6-9)

The Fab I and Randolph Classic balls, in and of themselves, cannot teach nor suggest Gentiluomo's claimed range of 1.195 to 0.38. How can a ball with a fixed specific gravity of 1.213 or 1.219 teach or suggest a lower specific gravity range of 1.195 to 0.38? (A255-256; A271-272; A284-2985; A290) (AB at 17-18)

Gentiluomo brought out the fact that the '071 patent does not teach of an inner core having a minimum specific gravity of 0.1063 or 0.1625 per pound of ball weight for balls ranging in weight from 8 to 16 pounds. Also, the '071 patent does not teach of a cover having a specific gravity range of 1.195 to 0.38 (AB at 19)

Gentiluomo presented argument showing that the '277 patent teaches a person skilled in the art that a reduction in ball

moment of inertia is attained by making the inner core 12 of lighter weight material that the surrounding cover material. This is counter to what the claims of the '614 patent teach. (AB 19-21)

A review of the record will reveal that there exists greater patentable differences between the '614 patent-claims and the teaching of the prior art, over and beyond the differences acknowledged by both Brunswick and the Court. Claim limitations 24(b), 24(d), 32(b) and 32(e) recite functional limitations of claimed structure which distinguish over cited prior art, and therefore should not be ignored. Ascription of claim that ascribes a function to any of the things it structurally specifies, is a limitation of the claim, and ignoring express functional limitation of claim would be to create a new claim, and not interpret the claim granted. Butler et al v. Helms, 550 F. 2d 954. In order for a claimed invention to be deemed obvious, the prior art must teach all the claim limitations of the '614 patent. In re Royka, 490 F. 2d 981. (AB at 22-23)

The District Court failed to establish the level of skill in the art at the time of the invention at issue. The Court merely stated that Brunswick does not contest the fact that the Plaintiff's knowledge surpassed the level of skill in the art at time of his invention. (AB at 23-24)

Petitioner presented statements of uncontested facts, to which Brunswick responded to by denials, or vague unsubstantiated allegations. Brunswick never provided any factual evidence contesting the correctness of Gentiluomo's statements of uncontested facts. Since Brunswick failed to provide the required factual evidence to contest the truth of said statements, said statements must be considered uncontested. Failure to contest a statement of uncontested fact, is treated as a binding admission of the truth of those facts. Tobey v. Extel/JWP, Inc., 985 F. 2d 330. Based on presented facts, it is apparent that the District Court failed to ascertain that Brunswick's allegations were fictitious, erroneous, and unsupported by factual evidence of record, and therefore, insufficient to raise genuine issue of

material fact for precluding the Petitioner's cross-motion for summary judgment. August v. Office unlimited, 981 F. 2d 576. Summary judgment is called for where it clearly appears that the issues are not genuine, but feigned. United Nat. Ins. Co. v. Tunnel, Inc., 988 F. 2ed 351. (AB at 25-42)

The District Court erred in not considering Plaintiff's cross-motion for summary judgment. A review of the District Court's decision (A6-A19) will reveal that the Court passed judgment solely on Defendant's motion for summary judgment. Based on established legal precedent, the Court must rule on each party's motion individually, and on their merits. McKay v. United States, supra. (AB at 42-43)

Findings not supported by substantial evidence are taken to be clearly erroneous. Freeport Sulphur Co. v. s/s Hermosa, 526 F. 2d 300. Findings of fact are clearly erroneous when they are against the weight of the evidence of record. Farm, Inc. v. Bitterling, 209 F. 2d 862. For example, the Court clearly erred in its findings of fact and its legal conclusion regarding the teaching of the '614 patent and the cited prior art taken as a whole, the difference between the claimed invention and the cited prior art taken as a whole, and the nonconsideration of the Plaintiff's cross-motion for summary judgment. (AB at 44-45)

II. Excerpts of Appeals Court Decision on Appeal, With Petitioner Comments

The Appeals Court June 5, 2002 decision at 7 stated that a determination of patent invalidity involves a two-step process. First, the court determines the scope and meaning of the patent claims at issue. The second step involves a comparison of the asserted claims with the prior art. Whether a claim would have been obvious at time of the invention is a question of law based on underlying findings of fact. We review a District Court's underlying findings of fact for clear error, while we rule de novo on the ultimate issue of obviousness.

At 9, the Court stated that it disagreed with Gentiluomo's weight-reallocation argument. That argument is premised on supposed limitations that do not appear in the relevant claims.

Gentiluomo contends that the phrase "fixed weight ball" as well as limitation (d) of claim 24, and limitation (e) of claim 32 support the notion of weight relocation. We do not agree. The phrase "fixed weight ball" denotes that the weight of the ball does not change over time. It thus does not carry with it the significance attributed to it by Gentiluomo. Moreover, limitation (d) of claim 24 and limitations (e) of claim 32 convey merely an intended result, rather than structural limitations with respect to a given bowling ball.

It should be noted that the above Court statements pertain to factual determinations that were **never made in District Court**. Since the District Court never determined the scope and meaning of the claims at issue, which is a legal determination based on **underlying factual findings**, it is not understood how the Appeals Court can make, **for the first time**, such a determination of claim construction. The appellate courts of the federal system, neither inherently nor by grant, express of implied, have the power to make factual findings. Randall Foundation Ins. v. Riddell, 244 F. 2d 803 (1957). Where the trial court made no findings on certain issues, Court of Appeals could not make such findings, even if it were possible upon the record. Deering-Milliken & Co., v. Moder-Aire of Hollywood, Inc., 231 F. 2d 623 (1956).

At 7 of its decision, the Appeal Court stated that "when both parties move for summary judgment, the court must evaluate each motion on its own merits." Citing McKay v. United States, 199 F. 3d 1376, 1380 (1999).

A review of the Court's decision will reveal that the Court only gave **lip-service** regarding McKay v. U.S. The Court never considered Gentiluomo's cross-motion for summary judgment, because no argument, whatsoever, was presented as to why the cross-motion did not meet the burden of proof for entitlement to summary judgment.

Also, the Court presented no facts of record that established the scope and content of the cited prior art taken as a whole, the scope and contents of the claims at issue taken as a whole, and

the level of ordinary skill in the art. Therefore, it is not understood how the Court made a legal conclusion of obviousness, when determinations on the above cited issues were never made according to the standard for review enunciated in Graham v. John Deere, supra. Yet, with all these unknowns, the Appeals Court affirmed the District Court's issuance of summary judgment based on obviousness.

III. Petitioner's Disclosure On Writ of Mandamus

In re Joseph A. Gentiluomo, Petitioner
Miscellaneous No. 731

Gentiluomo petitioned the Court of Appeal to exercise mandamus jurisdiction, and compel the District Court to perform clear legal duties to which he is legally entitled to that were not performed or decided, so as to promote justice and prevent irreparable harm.

Gentiluomo contended that mandamus is an obligation on the District Court, based on the fact that the Court **neglected to perform legally required nondiscretionary duties to which he has a clear legal right to have performed.** The neglected duties to which relief is sought entails the consideration of **Gentiluomo's cross-motion for summary judgment,** and the consideration of **Gentiluomo's claimed invention taken as a whole.** The legal duties that should have been performed in obedience to the mandate of legal authority, are set forth in the precedential case laws of McKay v. United States, supra, and Graham v. John Deere, supra.

a. Gentiluomo's Cross-Motion for Summary Judgment

With regard to the Petitioner's cross-motion for summary judgment, the District Court stated at 4 of its decision that "Both Plaintiff and Defendant Brunswick moved for summary judgment as to validity of the patent." At 13, the Court stated "Accordingly, it is hereby ordered that Plaintiff's motion for summary judgment is denied."

It should be noted that the above statements represent the sole extent of the Court's consideration of the Petitioner's

cross-motion for summary judgment. It should be further noted that the record will show that **none of the factual evidence** presented in the Petitioner's documents D1, D2, D3 and D4, supra, that pertain to the Petitioner's cross-motion for summary judgment, were ever considered by the District Court regarding the credibility of said cross-motion. By so doing, the Court disregarded established legal precedent set forth in McKay v. United States, because it simply did not present any argument, whatsoever, as to why Gentiluomo's cross-motion did not meet the burden of proof for entitlement to summary judgment.

When both parties move for summary judgment, the court **must evaluate each motion** on its own merits McKay v. U.S. When Plaintiffs and and Defendants file cross-motions for summary judgment, court **must rule** on each party's motion individually, determining in each case whether judgment may be entered in accordance with standards set forth in the summary judgment rule. Central States Southeast and Southwest Areas Pension Fund v. Miller, 868 F. Supp. 995 (1994). Cross-motions for summary judgment do not automatically empower court to dispense with determination of whether questions of material fact exist. Rather court **must evaluate each parties motion** on its own merits. Strauss v. Peninsula Regional Medical Center, 916 F. Supp. 528 (1996). Failure of the District Court to consider the Petitioner's cross-motion for summary judgment, was error as a matter of law. (AB at 42-43); (Mandamus Petition, MP4-6)

In order to support his cross-motion for summary judgment, Gentiluomo presented in his petition for mandamus (MP6-11) statements of uncontested facts numbers 7, 8, 9, 10, 11, 12, 15 and 16, that are disclosed in document D2. The above cited uncontested facts pertain to the Fab I and Randolph Classic ball, and were chosen because they represent **the only cited prior art for which the specific gravity of the cover material is known.**

Statement No. 7 provides reasons why the Fab I ball does not teach Plaintiff's claim limitations 24(a), 32(a) and 45(a).

Statement No. 8 provides reasons why the Fab I ball does not teach Plaintiff's claim limitations 24(b) and 32(b).

Statement No. 9 provides reasons why the Fab I ball does not teach Plaintiff's claim limitations 24(d).

Statement No. 10 provides reasons why the Randolph Classic Ball does not teach Plaintiff's claim limitations24(a), 32(a) and 45(a).

Statement No. 11 provides reasons why the Randolph Classic ball does not teach Plaintiff's claim limitations 24(b) and 32(b).

Statement No. 12 provides reasons why the Randolph Classic ball does not teach Plaintiff's claim limitation 24(d).

Statement No. 15 provides reasons why the Fab I ball does not teach Plaintiff's claim limitation 32(e).

Statement No. 16 provides reasons why the Randolph Classic ball does not teach plaintiff's claim limitation 32(e).

Brunswick responded to the above uncontested statements with mere denials and with unsubstantiated allegations. Nowhere, does Brunswick provide factual evidence disclosing how the prior art teaches claim limitations 24(a), (b), (d), and 32(a), (b), and (e) recited in the above cited statements, as will be noted from the "Excerpts of Brunswick's Response to Gentiluomo's Statements of Uncontested Facts," reproduced in the Appendix at 42 (App. 42).

Since Brunswick presented just denials and no factual evidence regarding the prior art teachings of claim limitations that were recited in Gentiluomo's statements of uncontested facts, their failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP Inc., supra. To create genuine issue of fact to preclude entry of summary judgment, non-moving party must not only identify alleged facts at issue, but must also support its findings with evidence based on appropriate reference to record before District Court. W.M. Ereanbrack Co., Inc. v. Sol Salins, Inc., 844 F. Supp. 817 (1994). In summary judgment proceedings, totally unsupported denials by nonmoving party have no legal effect whatsoev-

er, so that nonmoving party is deemed to have admitted moving parties statement of alleged uncontested facts. Aircraft Gear Corp. v. Kaman Aerospace Corp., 856 F. Supp. 446 (1994). (AB at 26-42) (Mandamus Petition, MP 4-12)

b. Gentiluomos's Claimed Invention Taken as a Whole

With respect to the Petitioner's claimed invention taken as a whole, the District Court stated at 7 that "The test for obviousness entails four factual determinations: (1) the scope and content of the prior art, (2) the difference between the claims and the prior art, (3) the level of ordinary skill in the pertinent art, and (4) secondary considerations, if any, of obviousness. Citing Uniroyal, Inc. v. Rudkin Wiley Corp., 837 F. 2d 1044, 1050 (1998), and Graham v. John Deere Co., 383 U.S. 1, 17 (1966).

A review of the District Court decision will reveal that the Court disregarded legal precedent set forth in Graham v. John Deere for determining the obviousness or unobviousness of a patent. The record will show that the scope and content of the cited prior art **taken as a whole,** the scope and content of the claims at issue **taken as a whole,** and the level of ordinary skill in the art at the time of invention, **were never factually determined.** Trial Court must supply adequate findings of fact and conclusions of law, to support its order or judgment. Parcel 49C Ltd. v. U.S., 31 F. 3d 1147 (1994).

The District Court granted summary judgment based solely on the contention that Gentiluomo failed to proffer any evidence of "criticality" regarding unexpected results attributable to the claimed specific gravity range recited in claim limitations 24(b) and 32(b). By so doing, the Court completely ignored the Petitioner's above presented factual evidence and attempted to consider **only a portion** of claim limitations 24(b) and 32(b), while **neglecting to consider completely** all the claim limitations recited within claims 24 and 32 **taken as a whole**. Yet, in complete violation of the standard for review for determining obviousness or unobviousness of a claimed inven-

tion, as enunciated by the Supreme Court in Graham v. John Deere, the District Court granted Brunswick summary judgment. A proper consideration of a claimed invention should encompass every claim limitation, not just the limitation Brunswick chose to conveniently pick out for attack. Rockwell International Corp. v. United States, 147 F. 3d 1359, 1364. When evaluating claims for obviousness under 35 U.S.C. § 103, all claim limitations must be considered and given weight. Ex parte Grasselli, 231 U.S.P.Q. 393; In re Wilder, 429 F. 2d 447. **All words** in a claim **must be considered** in judging the patentability of a claim against the prior art. In re Wilson, 424 F. 2d 1382.

With regard to the scope and content of the cited prior art, the District Court and the Appeals Court presented only the standard of review for determining the scope and content of the prior art. The Courts presented no factual evidence of record that establishes the scope and content of the cited prior art of Randolph (3,865,369; 4,131,277; 4,264,071), MacDonald (4,268,034; 4,353,850), Miller (4,522,397), and the Randolph Classic and Fab I bowling balls. Without the determination of the scope and content of the cited prior art, it is not understood how the Courts could utilize the teachings of the above cited prior art, **taken as a whole**, to render the '614 patent obvious.

Since **only** the Randolph Classic and Fab I prior art balls teach specific gravity values of 1.219 and 1.213 for the ball cover material, the Courts must have relied solely on said balls when it based obviousness on the "criticality" of the specific gravity ranges recited in claim limitations 24(b) and 32(b). Therefore, it is not understood how prior art balls with fixed cover densities of 1.219 or 1.213 could **express themselves** such as to **motivate** a person skilled in the art to use cover densities in the range of 1.195 to 0.38, for the purpose of increasing total kinetic energy output of a ball, especially when the prior art patents of the McDonald and Miller teach increasing cover density to provide more output energy.

Based on above facts, the District Court considered only a

portion of claim limitations 24(b) and 32(b), rather than all limitations recited in claims 24 and 32 **taken as a whole**. A review of the Court's decision will reveal that claim construction was never determined, regarding claim limitations 24(a), 24(b), 24(d), 32(a), 32(b) and 32(e), when **taken as a whole**. The first step in an invalidity analysis is claim construction which requires resolution of factual matters before a claim can be legally construed. Rockwell v. United States, supra.

Claim limitations 24(b), 24(d), 32(b) and 32(e) recite functional or process limitations which distinguish the claimed invention over the prior art. Ignoring express functional limitation of a claim would be to create a new claim and not interpret the claim granted, Butler et al v. Helms, supra. Functional characteristics place additional limitations on claimed product, and therefore must not be ignored. In re Echered et al, 471 F. 2d 632. Product claims may include process steps to wholly or partially define claimed product. When process limitations distinguish product over prior art, they **must** be given consideration. In re Hallman, 655 F. 2d 212.

Due to complex technical matters involved, expert testimony should have been used by the Court to interpret the functional or process limitations taken as a whole. The trial judge's failure to allow expert testimony represents an **abuse of discretion**. Markman v. Westview, 34 U.S.P.Q. 2d at 1339 (1995).

Regarding the level of skill in the art art time of invention, the District Court merely stated that Brunswick does not contest the fact that Plaintiff's knowledge surpassed the level of skill in the art at time of his invention. Based on said statement, it is apparent that the District Court never determined the level of skill. It should be noted that the inventor's skill is not helpful in determining the level of skill in the art at time of invention. Custom Accessories, Inc. v. Jeffrey-Allen Ind., Inc., 807 F. 2d at 962 (1986). The level of skill is a factual question that must be resolved and considered. Ryko Mfg. Co. v. Nu-Star, Inc., 950 F. 2d 718 (1991).

Based on presented facts, how can **undetermined teach-**

ings of the cited prior art provide a suggestion or motivation to a person of **undetermined level of skill in the art**, to provide an invention of **undetermined claim construction**. Yet, in the presence of such unknowns, the District Court granted Brunswick summary judgment, and the Appeals Court affirmed. The trial court's findings which did not contain specific factual findings on scope and content of the prior art or difference between the prior art and the claims at issue, or the level of skill in the art, were **legally insufficient** to support a finding of obviousness. Jones v. Hardy, 727 F. 2d 1525, 1529 (1984). (MP12-18)

IV. Excerpts of Appeals Court Orders on Writ of Mandamus, With Petitioner Comments

In its May 1, 2003 order, the Appeals Court stated that a mandamus petition may not be used to secure review of a case when that case may be reviewed by way of ordinary appeal. Citing Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 9 M.6 (1983). A court of appeals has no occasion to engage in extraordinary review by mandamus in aid of its jurisdiction, 28 U.S.C. § 1651, when it can exercise the same review by a contemporaneous ordinary appeal. Gentiluomo has already been provided with a review of the District Court judgment on ordinary appeal. He has exhausted the avenues of further review when the Supreme Court denied his petition for writ of certiorari.

In a request for reconsideration of his mandamus petition filed May 12, 2003, the petitioner responded as follows:

Based on the fact that the legal precedent set forth in Hospital v. Mercury, supra, **which was relied upon by the Court of Appeals in denial of the instant petition does not apply to the prevailing circumstances associated with Gentiluomo's petition**, it is respectfully requested that this response by seriously considered, because a **drastic extraordinary mistake has been made by the Court**. The Court should note that Hospital v. Mercury is not in point with the instant case of Gentiluomo. In the cited case, Mercury sought appellate

review through two alternative routes, a notice of appeal under § 1291 and a petition for mandamus under the All Writs Act 28 U.S.C. § 1651 (M.6). Foot note 6 pertained to the Hospital argument that the Court should deal with Mercury's mandamus petition before considering any appeal. The Supreme Court stated that the Court of Appeals has no occasion to engage in extraordinary review by mandamus in aid of its jurisdiction, 28 U.S.C. § 1651, when it can exercise the same review by a contemporaneous ordinary appeal.

It should be noted that Gentiluomo is not simultaneously seeking review through two alternative routes, an appeal and a petition of mandamus under § 1651. Therefore, the Court of Appeal's cited case law has no applicability whatsoever to Gentiluomo's Case 731.

The Appeals Court's attention is directed to pages 25-43 of Gentiluomo's appeal brief to note his presented arguments regarding the District Court's failure to consider his cross-motion for summary judgment, upon which the Appeals Court failed to pass judgment on. Also, the Appeals Court attention is directed to pages 6-25 of Gentiluomo's appeal brief and to pages 1-9 of his denied rehearing petition, to note Gentiluomo's argument regarding the District Court's failure to consider the claimed invention taken as a whole, also upon which the Appeals Court failed to pass judgment on. Based on presented facts, how can the Appeal Court now infer that it has no occasion to engage in extraordinary review of the instant case, when **it failed to consider and pass judgment on the above cited critical issues, in the first place, in its decision dated June 5, 2002.**

The Appeals Court in its decision at 7 solely stated the standards of review for the consideration of cross-motions for summary judgment by citing McKay v. U.S. and citing Graham v. John Deere for determining a claimed invention taken as a whole. There is **nothing whatsoever** in the Court's decision that discloses how the District Court met the requirements mandated by the above cited precedential case laws, and the

Court never compelled the District Court to meet the requirements. This represents a **clear abuse of discretion** on the part of both the Appeals Court and the District Court. Since the Appeals Court failed to adjudicate the above cited critical issues on appeal, that are **required by law to be resolved** in a patent validity case before a proper determination can be made, the petitioner had no other legal remedy than to petition the Appeals Court for writ of mandamus, for which it is obligated to issue in order to assist in rectifying a clear abuse of discretion by the District Court. Based on presented facts, Gentiluomo has a **clear and indisputable right to have rectified** the District Courts error, so that his **rights to a just jury trial** will not be irretrievably lost. Mandamus should issue by appellate court in cases of clear abuse of discretion or usurpation of judicial power. ACF Industries, Inc. v. Guinn, 384 F. 2d 15.

The Appeals Court also stated that Gentiluomo has exhausted the avenues of further review when the Supreme Court denied his petition for writ of certiorari. The Petitioner responded by stating that the denial by the Supreme Court of certiorari merely means that as a matter of judicial discretion fewer than four members of the Court deemed it desirable to review the lower court decision, and such a denial imports no expression of opinion upon the merits of the case. Agoston v. Com. of Pat., 71 S. Ct. 9.

Therefore, it is apparent that the issues presented on mandamus that are entirely different than the issues that were presented in certiorari, could never have been decided in the Supreme Court on a denied writ of certiorari. Based on his petition for mandamus, and the herein presented facts, Gentiluomo has not exhausted the avenues of further review, because the **issues presented in mandamus represent duties, that according to law, should have been definitely performed by the District Court, and were not.**

In an order dated October 2, 2003, regarding the reconsideration of the Court's May 1, 2003 order, the Court merely stat-

ed, **without opinion**, that upon consideration the motion is denied.

This represents a **clear abuse of discretion** for a court to act in this manner. Especially after the Petitioner presented **undisputably convincing factual evidence** that the Court's denial of mandamus based on Hospital v. Mercury was erroneous, and that the record clearly shows that Gentiluomo's cross-motion for summary judgment and his claimed invention taken as a whole, were never considered.

C. Reasons For Granting The Writ

The Appeals Court's denial of the Petitioner's petition for writ of mandamus was based on **false statements**. the Court stated that "a mandamus petition may not be issued to secure review of a case when that case may be reviewed by way of ordinary appeal." Citing Hospital v. Mercury, supra. Based on the history of this case, the Court knew with absolute certainty, that the Petitioner presented factual evidence in both his appeal brief and in his petition for writ of mandamus regarding the District Court's and Appeal Court's failure or refusal to exercise or abide to the required court duties enunciated in precedential case laws of Graham v. John Deere and McKay v. United States. Since the Court ignored consideration of the presented **critical issues** of Gentiluomo's claimed invention taken as a whole and his cross-motion for summary judgment, and based on its knowledge of the case, it must be concluded that the Court issued the inapplicable case law of Hospital v. Mercury, with the intent of deceiving the Petitioner into believing that his mandamus petition was inappropriate. Hospital v. Mercury pertains to the situation where both an appeal and writ of mandamus were filed contemporaneously. In the instant case, the Petitioner had previously filed an appeal wherein the **Court failed to act on above cited critical issues,** to which the Court had **clear jurisdiction**. Based on presented facts, the Petitioner is entitled to mandamus to compel the Court of Appeals to exercise its jurisdiction, which it unlawfully repudi-

ated. The Court of Appeals has so **flagrantly abused its discretion,** that there exists **an usurpation of power.** Mandamus should issue by appellate court in cases of clear abuse of discretion or usurpation of judicial power. ACF Industries, Inc. v. Guinn, supra. When there is an absolute right to the performance of a particular duty, a writ should issue as a matter of course, and nothing is left to the discretion of the Court. 52 Am. Jur. 2d § 26. **The failure or refusal to perform required duties constitute a clear abuse of discretion.** Schlagenhauf v. Holder, 379 U.S. at 110 (1964). To correct the Appeal Court's abuse of discretion and usurpation of power, the Petitioner prays that the Supreme Court will exercise its jurisdictional power and pass judgment on whether Hospital v. Mercury was an appropriate case law upon which to base a denial of Gentiluomo's petition for writ of mandamus.

As a means of implementing mandamus, the writ will issue only in extraordinary circumstances, as set forth as follows:

(1) The party seeking issuance of the writ must have no other adequate means to attain the relief desired.

(2) That the party satisfy the burden of showing that his right to issuance of writ is clear and undisputable. Kerr v. U.S. District Court, 426 U.S. at 403 (1976).

Referral to the "Procedural History" on pages 3-4, supra, will definitely reveal that the petitioner exhausted all other avenues of further review. Also, referral to page 1 and other herein presented facts, supra, will show that the Petitioner's right to issuance of the writ is clear and undisputable, because the precedential case laws of Graham v. John Deere and McKay v. United States clearly and undisputably set forth the ministerial acts to be performed by the Court, and were not.

In determining whether mandamus should issue, no single factor is determinative, and all five factors set forth below need not be satisfied at any one time.

(1) Whether party seeking writ has no other adequate means to

attain relief desired.

(2) Whether the party will be damaged or prejudiced in a way not correctable on appeal.

(3) Whether order is clearly erroneous as a matter of law.

(4) Whether order manifests persistent disregard of federal rules.

(5) Whether order presents issue of law that may repeatedly evade review.

In re Cement Antitrust Litigation, 688 F. 2d 1297 (1982); affirmed 103 S. Ct. 1173; In re American Medical Systems Inc., 75 F. 3d 1069 (1996).

With regard to Factor No. 1, refer to "Procedural History" on pages 3-4, supra, which reveals that the Petitioner exhausted all other avenues of relief, and the defendant owes him a clear nondiscretionary duty. Hecker v. Ringer, 466 U.S. at 616 (1984).

With regard to Factor No. 2, the herein presented facts reveal that the relief the Petitioner is seeking was ignored by the Appeals Court when presented on appeal and writ. Based on said facts, a writ is in order for correcting the Court's clear legal error of not considering Gentiluomo's factual evidence regarding the claimed invention taken as a whole and his cross-motion for summary judgment, which **cannot be rightfully resubmitted on another appeal. Mandamus should be granted for clear error of law.** Sporek v. Peil, 759 F. 2d 312 (1983). Since the Petitioner has expended 23 years of effort and his lifes savings to develop, pursue, and legally protect his patented invention, he would be highly damaged and prejudiced unless mandamus is granted to give him the opportunity to exercise his Constitutional Right of proving the validity of his patent, at trial.

With respect to Factor No. 3, the herein presented facts reveal that both the District Court and the Appeals Court orders are clearly erroneous because they failed to utilize required precedential case laws in making their legal determinations.

With regard to Factor No. 4, it is apparent that since both the District Court and Appeals Court disregarded the legal rules mandated in Graham v. John Deere and McKay v. United States, this behavior represents a persistent disregard of federal rules.

With regard to Factor No. 5, since both the District Court and the United States Appeals Court failed to utilize the law enunciated in Graham v. John Deere and McKay v. United States toward the review of the instant case, there should be concern as to whether or not the orders of said Courts present issues of law that may repeatedly evade proper review.

The Federal Courts neglect in abiding to the Fed. R. Civ. P. 56(c), in considering the Petitioner's "Statements of Uncontested Facts," constitutes a **clear abuse of discretion.**

A writ is appropriately issued when there is an usurpation of judicial power, or a clear abuse of discretion. Schlagenhauf V. Holder, supra. **Function of mandamus is to correct an abuse of judicial power, or a refusal to correct it.** Roche v. Evaporated Milk Associated, 319 U.S. at 31 (1943). The record will show that both the District Court and Appeals Court failed or refused to perform required duties mandated in Graham v. John Deere and McKay v. United States, to properly adjudicate obviousness of a claimed patent and cross-motion for summary judgment. This represents a **flagrant legal error** that was condoned by the Appeals Court, even after said error was brought to the Court's attention in the Petitioner's appeal brief and in his writ of mandamus. Such conduct by both Courts constitute a **clear abuse of discretion.**

Mandamus should issue if appellate court needs to exercise supervisory power over lower courts, to correct abuses of jurisdiction, and to compel the performance of purely ministerial duties. Appellate courts should issue mandamus if there exists clear right in the plaintiff to the relief sought, the existence of a legal duty on the part of the respondent to act, and the absence of another adequate remedy of law. 52 Am. Jur. 2d § 12.

D. Conclusions

It is apparent from the herein presented facts, that the Court of Appeals for the Federal Circuit abused its discretion, regarding Graham v. John Deere and McKay v. United States, by either neglecting to or refusing to, exercise its jurisdiction to compel the District Court to properly apply the above cited precedential case laws, and also abused its discretion by not properly exercising its jurisdiction regarding its citing of Hospital v. Mercury. Such behavior begs the question as to whether or not the Court of Appeals of the Federal Circuit is above the law, such as to be allowed to violate both Federal Circuit and Supreme Court precedential case laws. Therefore, due to such **abuse of discretion**, the Petitioner respectfully contends that the Appeals Court so far departed from accepted and usual course of judicial proceedings, that the supervisory powers of this Court should be invoked, such as to compel the U.S. Court of Appeal for the Federal Circuit to issue a writ of mandamus to the U.S. District Court, Northern District of New York.

Respectfully submitted,

Joseph A. Gentiluomo,
Pro se

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MISCELLANEOUS NO. 731
IN RE JOSEPH A GENTILUOMO,
Petitioner.

ON MOTION

Before NEWMAN, BRYSON and DYK, Circuit Judges.
BRYSON, Circuit Judge.

ORDER

Joseph A. Gentiluomo moves for reconsideration of the courts May 1, 2003 order denying his petition for a writ of mandamus.

Upon consideration thereof,
IT IS ORDERED THAT:
The motion is denied.

FOR THE COURT

Oct 2, 2003

/s/ William C. Bryson
WILLIAM C. BRYSON
Circuit Judge

cc: Joseph A. Gentiluomo
Michael O. Warnecki, Esq.
William B. Nash, Esq.
Stepehn G. Kehoe, Esq.
USDC, N.D.N.Y., Judge
USDC, N.D.N.Y., Clerk

FILED
U.S. Court of Appeals
for the Federal Circuit
Oct. 2, 2003
Jan Horbaly
Clerk

United States Court of Appeals for the Federal Circuit
Misc. No. 731
In re Joseph A. Gentiluomo, Petitioner
Request For Reconsideration Of Mandamus Petition

Based on the fact that the legal precedent set forth in Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. at 8 n.6, which was relied upon by the Court of Appeals in denial of the instant petition does not apply to the prevailing circumstances with Gentiluomo's petition, it is respectfully requested that this response be **seriously considered**, because a **drastic extraordinary mistake** has been made by the Court.

In its Order, the Court stated that a mandamus petition may not be used to secure review of a case when the case may be reviewed by way of ordinary appeal. Gentiluomo has already been provided with a review of the District Court judgment on ordinary appeal.

The Court of Appeals should note that its cited case regarding Hospital v. Mercury, is not in point with the instant case of Gentiluomo. There is no similarity whatsoever. In the cited case, Mercury sought appellate review through two alternative routes, a notice of appeal under § 1291 and a petition for mandamus under the All Writs Act 28 U.S.C. § 1651 (Foot Note 6).

Foot note 6 states that the Hospital argues that because Mercury's filing in the Court of Appeals was styled a petition for mandamus first and a notice of appeal only in the alternative, the Hospital was somehow entitled to have the Court of Appeals apply the stricter standards of review that obtain under the mandamus procedure before considering any appeal.

The Supreme Court stated that it does not understand why this order of proceeding would be of any benefit to the Hospital. It further stated that the Court of Appeals has no occasion to engage in extraordinary review by mandamus in aid of its jurisdiction, 28 U.S.C.§1651, when it can exercise the same review by a contemporaneous ordinary appeal.

It should be noted that Gentiluomo is not simultaneously

seeking review through two alternative routes, an appeal and a petition for writ of mandamus under §1651. Therefore, the Court of Appeal's cited case law has no applicability whatsoever to Gentiluomo's instant case No. 731.

The Appeals Court's attention is directed to pages 25-43 of Gentiluomo's appeal brief to note his presented arguments regarding the District Court's failure to consider his cross-motion for summary judgment, upon which the Appeals Court failed to pass judgment on. Also the Appeals Court attention is directed to pages 6-25 of Gentiluomo's appeal brief and to pages 1-9 of his denied rehearing petition, to note Gentiluomo's arguments regarding the District Court's failure to consider the claimed invention taken as a whole, also upon which the Appeals Court failed to pass judgment on. Based on presented facts, how can the Appeals Court now say that it has no occasion to engage in extraordinary review of the instant case, when it failed to consider and pass judgment on the above cited critical issues, in the first place, in its decision dated June 5, 2002.

The Appeals Court in its decision at 7 solely stated the standards of review for the consideration of cross-motions for summary judgment by citing McKay v. U.S., and citing Graham v. John Deere for determining a claimed invention taken as a whole. There is nothing whatsoever, in the Court's decision that discloses how the District Court met the requirements mandated by the above cited precedential case laws, and the court never compelled the District Court to meet the requirements. This represents a **clear abuse of discretion** on the part of both the Appeals Court and the District Court. Since the Appeals Court failed to adjudicate the above cited critical issues that are required by law to be resolved in a patent validity case before a proper determination can be made, the petitioner has no other legal remedy than to petition the Appeals Court for writ of mandamus, for which it is obligated to issue in order to assist in rectifying a **clear abuse of discretion** by the District Court. Based on presented facts, Gentiluomo has a **clear and indisputable right to have rectified** the District Court's error, so

that **his rights to a just jury trial** will not be retrievably lost. Mandamus should issue by appellate court in cases of clear abuse of discretion or usurpation of judicial power. ACF Industries, Inc. v. Guinn, 384 F.2d 15.

The Appeals Court also stated that Gentiluomo has exhausted the avenues of further review when the Supreme Court denied his petition for writ of certiorari.

It should be noted that cases selected for review are screened based solely on the contents of the questions presented for review in the certiorari, and the refusal to hear a case cannot be taken as a decision on the merits of the case. Denial by the Supreme Court of a writ of certiorari merely means that as a matter of judicial discretion fewer than four members of the Court deemed it desirable to review a decision of a lower court, and such denial imports no expression of opinion upon the merits of the case. Agoston v. Com. of Pa., 71 S.Ct.9. Denial of writ of certiorari by the U.S. Supreme Court carries with it no implication wharsoever regarding the court's views on the merits of the case. Beck v. Winters, 407 F.2d 125. Therefore it is apparent that the issues presented in the petition for writ of mandamus, could never have been factually decided in the Supreme Court on a **denied writ of certiorari**.

Base on the petitioner's petition for writ of mandamus, and the herein presented facts, Gentiluomo has not exhausted the avenues of further review, because the **issues presented in mandamus represent duties, that according to law, should have been definitely performed by the District Court, and were not.**

Date:
May 12, 2003

Respectfully submitted,
/s/ Joseph A. Gentiluomo
JOSEPH A GENTILUOMO, Pro se

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. it is a public order

UNITED STATE COURT OF APPEALS FOR THE FEDERAL CIRCUIT
Miscellaneous No. 731

IN RE JOSEPH A. GENTILUOMO,
Petitioner.

ON PETITION FOR WRIT OF MANDAMUS

Before NEWMAN, BRYSON and DYK, Circuit Judges.
BRYSON, Circuit Judge.

ORDER

Joseph A. Gentiluomo petitions for a writ of mandamus to direct the United States District Court for the Northern District of New York to, in essence, correct the errors that Gentiluomo alleges the district court previously made in his case, Gentiluomo v. Brunswick Bowling & Billiards Corp., No. 96-cv-544 (N.D.N.Y. Nov. 1, 1999).

Brunswick Bowling & Billiards Corporation and Gentiluomo each filed a motion for summary judgment regarding the issue of validity in district court. The district court granted Brunswick's motion and denied Gentiluomo's motion, holding that the four relevant claims of Gentiluomo's patent were invalid. Gentiluomo appealed and on June 5, 2002 we affirmed the judgment of invalidity of three of the claims. We subsequently denied Gentiluomo's petition for panel rehearing. On December 2, 2002, the Supreme Court denied Gentiluomo's petition for a writ of certiorari.

Gentiluomo now seeks review of the district court's judgment by way of this petition for writ of mandamus. However, a mandamus petition may not be used to secure review of a

case when that case may be reviewed by way of ordinary appeal. Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 9 n. 6 (1983) (a court of appeals has no occasion to engage in extraordinary review by mandamus "in aid of its jurisdiction," 28 U.S.C. § 1651, when it can exercise the same review by a contemporaneous ordinary appeal). Gentiluomo has already been provided with a review of the district court judgment on ordinary appeal. He exhausted the avenues of further review when the Supreme Court denied his petition for a writ of certiorari.

Accordingly,
IT IS ORDERED THAT:
The petition is denied.

FOR THE COURT

May 1, 2003

/s/ William C. Bryson
WILLIAM C. BRYSON
Circuit Judge

cc: Joseph A. Gentiluomo
Michael O. Warnecki, Esq.
William B. Nash, Esq.
Stepehn G. Kehoe, Esq.
USDC, N.D.N.Y., Judge
USDC, N.D.N.Y., Clerk

s5

FILED
U.S. Court of Appeals
for the Federal Circuit
May 1, 2003
Jan Horbaly
Clerk

United States Court of Appeals for the Federal Circuit
In re Joseph A. Gentiluomo, Petitioner

I. Preface:

The Petitioner, Joseph A. Gentiluomo, petitions the Court of Appeals to exercise mandamus jurisdiction, and compel the District Court to perform clear legal duties to which Gentiluomo is legally entitled to that were not performed or decided, so as to promote justice and prevent irreparable harm.

Gentiluomo contends that mandamus is an obligation on the District Court, based on the fact that the Court has neglected to perform legally required nondiscretionary duties to which he has a clear legal right to have performed. The neglected duties to which relief is sought entails the consideration of Gentiluomo's cross-motion for summary judgement, and the consideration of Gentiluomo's claimed invention taken as a whole. The legal duties that should have been performed in obedience to the mandate of legal authority, are set forth in the precedential case laws of McKay v. United States, 199 F. 3d 1376, 1380 (Fed. Cir. 1999), and Graham v. John Deere, 148 USPO 460, 467, 472 (S. Ct. 1966).

It should be noted that a writ of mandamus is a remedy to compel the performance of a duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. Coleman v. Cox, 47 F 2d 988, 989; Bayard v. United States, 8 S.Ct. 1223, 1225.

a. Gentiluomo's Cross-Motion for Summary Judgment

The District Court in its decision at 4 stated that "Both Plaintiff and Defendant Brunswick have moved for summary judgment as to the validity of the patent." At 13, the court stated "Accordingly, it is hereby Ordered that Plaintiff's motion for summary judgment is denied."

It should be noted that the above cited court statements represent the sole extent of the court's evaluation of Gentiluomo's cross-motion for summary judgment.

In the District Court, Gentiluomo presented the following

documents:

1) Plaintiff's Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Opposition to Defendant Brunswick's Motion for Summary Judgment (A248-256; A258-261; A263-265)

2) Plaintiff's Statement of Uncontested Facts Pursuant to Local Rule 7.1 in Support of Its Cross-Motion for Summary Judgment on Non-Obviousness (A282-288)

3) Plaintiff's Affidavit in Support of Summary Judgment Motion (A267-273; A276-280)

4) Reply Affidavit of Joseph A. Gentiluomo in Further Support of Plaintiff's Motion for Summary Judgment (A293-298; A301-302)

It should be noted that the record will show that none of the factual evidence presented in the above cited documents, were ever considered by the District Court regarding the credibility of Gentiluomo's cross-motion for summary judgment. The court disregarded established legal precedent set forth in McKay v. United States, because it simply did not present any argument, whatsoever, as to why Gentiluomo's cross-motion did not meet the burden of proof for entitlement to summary judgment. When both parties move for summary judgment, the court must evaluate each motion on its own merits. McKay v. United States, 199 F. 3d 1376, 1380 (Fed. Cir. 1999). When Plaintiff's and Defendants have filed cross-motion for summary judgment, court must rule on each party's motion individually, determining in each case whether judgment may be entered in accordance with standards set forth in the summary judgment rule. Central States Southeast and Southwest Areas Pension Fund v. Miller, 868 F. Supp. 995 (1994). Cross-motions for summary judgment do not automatically empower court to dispense with determination of whether questions of material fact exist. Rather, court must evaluate each parties motion on its own merits, taking care in each instance to draw all reasonable inferences against party whose motion is under consideration. Strauss v. Peninsula Regional Medical Center, 916 F. Supp. 528 (1996).

Based on the following presented facts, it will become apparent that consideration of Gentiluomo's presented Statement of Uncontested Facts along with Brunswick's response thereto, is imperative for the proper determination of Gentiluomo's cross-motion for summary judgment.

Statement No. 7:

The Fab I bowling ball teaches only that the 16 pound ball has an inner core specific-gravity of 2.151. Since the Fab I bowling ball cannot teach of a specific gravity per pound of ball weight for balls ranging in weight from 8 to 16 pounds, the Fab I ball does not teach Plaintiff's claim limitations 24(a), 32(a) and 45(a).

Brunswick's denial of the truth of above cited Statement No. 7 presents a non-genuine and feigned issue. Gentiluomo in his reissue application stated that the Fab I ball anticipated claims 1 and 12 of his 5,098,096 patent, not claim 24 and 32 of his reissue patent Re.34,614. Also, Brunswick's remark that Gentiluomo admitted during the prosecution of his '614 patent that the Fab I ball expressly discloses claim limitations 24(a), 32(a) and 45(a) is a complete fabrication. Note that Brunswick provided no evidence as to where in the prosecution history such erroneous unsubstantiated allegations exist. Had the Court investigated the issue, it would have determined Brunswick's allegation false.

Since Brunswick presented no factual evidence to show how the Fab I ball teaches claim limitations 24(a), 32(a) and 45(a), its failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc., 985 F. 2d 330.

Statement No. 8:

The Fab I bowling ball teaches only that the material adjacent to the inner core of the 16 pound ball is made of a fixed weight density polyester that has a specific gravity of 1.213. Since the Fab I ball cannot teach of an adjustable density ranging from 1.195 to 0.38, for the purpose of effectuating a decrease in ball moment of inertia, the Fab I ball cannot teach Plaintiff's claim limitations 24(b) and 32(b).

Brunswick's reason for the denial of the truth of the above cited Statement No. 8, is non-responsive to the statement. To be responsive, Brunswick should have shown how the Fab I ball, in and of itself, teaches a specific gravity range of 1.195 to 0.38 for the material adjacent to the inner core. Since Brunswick presented no factual evidence contesting the correctness of Statement No. 8 regarding claim limitations 24(b) and 32(b), its failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc., supra.

Statement No. 9:

The Fab I bowling ball, in and of itself, cannot teach the inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 24(d).

Brunswick's reason for the denial of the truth of the above cited Statement No. 9, is non-responsive to the statement. To be responsive, Brunswick should have shown how the Fab I ball, in and of itself, teaches what is recited in claim limitation 24(d). Since Brunswick presented no factual evidence to show how the Fab I ball teaches claim limitation 24(d), its failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc. supra.

Statement No. 10:

The Randolph Classic bowling ball teaches only that the 15 pound ball has an inner core specific gravity of 2.468. Since the Randolph Classic ball cannot teach a specific gravity per pound of ball weight, for balls ranging in weight from 8 to 16 pounds, said ball does no teach Plaintiff's claim limitations 24(a), 32(a) and 45(a).

Brunswick's reason for the denial of the truth of the above cited Statement No. 10, is non-responsive to the statement. To be responsive, Brunswick should have shown how the Randolph Classic ball, in and of itself, teaches the minimum inner core specific gravity of balls other than 15 pounds in weight. Since Brunswick presented no factual evidence to show how the Randolph Classic ball teaches claim limitations 24(a), 32(a) and 45(a), its failure to do so must be treated as a

binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc., supra.

Statement No. 11:

The Randolph Classic bowling ball teaches only that the material adjacent to the inner core of the 15 pound ball is made of a fixed density polyester that has a specific gravity of 1.219. Since the Randolph Classic ball cannot teach of an adjustable density ranging from 1.195 to 0.38 for the purpose of effectuating a decrease in ball moment of inertia, the ball cannot teach Plaintiff's claim limitations 24(b) and 32(b).

Brunswick's reason for the denial of the truth of above cited Statement No. 11, is non-responsive to the statement. To be responsive, Brunswick should have shown how the Randolph Classic ball, in and of itself, teaches a specific gravity range of 1.195 to 0.38 for the material adjacent to the inner core. Since the Randolph Classic ball teaches only of a fixed specific gravity of 1.219, it is apparent that it cannot teach a specific gravity range of 1.195 to 0.38. Therefore, since Brunswick presented no factual evidence to show how the Randolph Classic ball teaches claim limitations 24(b) and 32(b), its failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc., supra.

Statement No. 12:

The Randolph Classic bowling ball, in and of itself, cannot teach the inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 24(d).

Brunswick's response that Gentiluomo admitted in his reissue declaration that the Randolph Classic bowling ball anticipated claim limitation 24(d), is false. A review of the reissue declaration will prove said statement false.

Brunswick's reason for the denial of the truth of above cited Statement 12, is non-responsive to the statement. To be responsive, Brunswick should have factually shown how the Randolph Classic ball, in and of itself, teaches what is recited in claim limitation 24(d). Since Brunswick presented no factual evidence to show how the Randolph Classic ball teaches

claim limitation 24(d), its failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc., supra.

Statement No. 15:

The Fab I bowling ball, in and of itself, cannot teach the inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 32(e).

Brunswick's statement that Gentiluomo admitted that the Fab 1 ball was a ball having a moment of inertia that decreased with an increase in the inner core density for the purpose of obtaining an increase in total kinetic energy output of the ball, is an outright fabrication. How can a bowling ball that has fixed structural and material elements teach that it has a moment of inertia that will decrease with an increase in inner core density, for the purpose of obtaining an increase in total kinetic energy output? To do so, the ball must be able to verbally express itself.

Brunswick's reason for the denial of the truth of Statement No. 15, is non-response to the statement. Brunswick's response should have been directed toward showing how the Fab I ball, in and of itself, teaches what is recited in claim limitation 32(e). Since Brunswick presented no factual evidence regarding the teachings of claim limitation 32(e) by the Fab I ball,, its failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc. supra.

Statement No. 16:

The Randolph Classic bowling ball, in and of itself, cannot teach the inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 32(e).

Brunswick's statement that Gentiluomo admitted that the Randolph Classic ball was a ball having a moment of inertia that decreased with an increase in the inner core density for the purpose of obtaining an increase in total kinetic energy output of the ball, is an outright fabrication. How can a bowling ball that has fixed structural and material elements teach that it has a moment of inertia that will decrease with an increase in inner core density for the purpose of obtaining an increase in total

kinetic energy output? To do so, a ball must be able to verbally express itself.

Brunswick's reason for the denial of the truth of the above cited Statement No. 16, is non-responsive to the statement. Brunswick's response should have been directed toward showing how the Randolph Classic ball, in and of itself, teaches what is recited in claim limitation 32(e). Since Brunswick presented no factual evidence regarding the teachings of claim limitation 32(e) by the Randolph Classic ball, its failure to do so must be treated as a binding admission of the truth of the fact. Tobey v. Extel/JWP, Inc., supra.

Summary judgment is called for where it clearly appears that the issues are not genuine, but feigned. United Nat. Ins. Co. v. Tunnel, Inc., 988 F. 2d 351. Mere denial of particular fact without specific reference to supporting material that allegedly establishes factual dispute, is insufficient for summary judgment purposes, and where factual assertion is met with such naked denial, the fact may be deemed admitted. Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226 (1995). To create genuine issue of fact to preclude entry of summary judgment, non-moving party must not only identify alleged facts at issue, but must also support its findings with evidence based on appropriate reference to record before District Court. W.M. Ereanbrack Co., Inc., v. Sol Salins., Inc., 844 F. Supp. 817 (1994). In summary judgment proceedings, totally unsupported denials by nonmoving party have no legal effect whatsoever, so that nonmoving party is deemed to have admitted moving parties statement of alleged uncontested facts. Aircraft Gear Corp. v. Kaman Aerospace Corp., 856 F. Supp. 446 (1994).

b. Gentiluomo's Claimed Invention Taken as a Whole

The District Court stated at 7 that "The test for obviousness entails four factual determinations: (1) the scope and content of the prior art, (2) the differences between the claims and the prior art, (3) the level of ordinary skill in the pertinent art; and (4) secondary considerations, if any, of nonobviousness." Citing Uniroyal, Inc. v. Rudkin Wiley Corp., 837 F. 2d 1044, 1050

(Fed. Cir. 1988), and Graham v. John Deere Co., 383 U.S. 1, 17 (1966).

A review of the District Court decision will reveal that the Court disregarded established legal precedent set forth in Graham v. John Deere for determining patent validity/invalidity based on obviousness/nonobviousness. The record will show that the scope and content of the cited prior art taken as a whole, the scope and content of the claims at issue taken as a whole, and the level of ordinary skill in the art at the time of invention, were never factually determined. The District Court's granting of summary judgment was based solely on the contention that because Gentiluomo failed to proffer any evidence of "criticality" regarding unexpected results attributable to the claimed specific gravity range recited in claim limitations 24(b) and 32(b), Brunswick was entitled to summary judgment. By doing so, the Court considered only a portion of claim limitations 24(b) and 32(b), while neglecting to consider completely all the claim limitations recited within claims 24 and 32 taken as a whole. A proper consideration of a claimed invention should encompass every claim limitation, not just the limitation Brunswick chose to conveniently pick out for attack. Rockwell International Corp. v. United States, 147 F. 3d 1359, 1364 (Fed. Cir. 1998).

1. Scope and Content of Cited Prior Art Taken as a Whole

The District Court stated at 7 that "the scope of the relevant art is that reasonably pertinent to the mechanics of bowling ball design." Also, the District Court stated in its decision at 8 that the combined teachings of the prior art as a whole must be considered in determining whether an invention is obvious, and that to invalidate claimed subject matter for obviousness the combined teachings of the prior art references must suggest expressly or by implication the improvement embodied by the invention.

It should be noted that the District Court presented only the standard of review for determining the scope and content of the prior art. The Court presented no factual evidence of record that

establishes the scope and content of the cited prior art of Randolph (3,865,369; 4,131,277; 4,264,071), MacDonald (4,268,034; 4,353,850), Miller (4,522,397), and the Randolph Classic and Fab I bowling balls. The District Court's decision does not disclose which prior art references or combination of references provide the basis for determining obviousness. It also does not disclose what teachings are relied on from each reference, and how the teachings render the claimed invention obvious. Therefore, it is not understood how the District Court utilized the teachings of the above cited prior art, taken as a whole, to render the '614 patent obvious.

Based on the fact that the prior art patents of Randolph do not disclose or mention any specific gravity values whatsoever, the Courts must have relied solely on the Randolph Classic and Fab I bowling balls, when they based obviousness on the "criticality" of the specific gravity ranges cited in claim limitations 24(b) and 32(b). Since the Randolph Classic ball teaches solely that a 15 pound ball has a cover specific gravity of 1.219, and the Fab I ball teaches solely that a 16 pound ball has a cover specific gravity of 1.213, said balls in and of themselves teach only that the covers of said balls have fixed specific gravities of 1.213 or 1.219. Therefore, it is not understood how balls that have fixed cover densities can express themselves such as to tell or motivate a person of ordinary skill in the art to remove weight from the outer portion of a prior art fixed weight ball and relocate said weight to within the inner portion, for the purpose of increasing the total kinetic energy output of said prior art ball, especially when the prior art patents of MacDonald and Miller teach just the opposite.

2. Scope and Content of the Claims at Issue

The District Court stated at 11 that "The primary difference between the prior art and claims 24 and 32 in the Patent are the precise specific gravity ranges set forth in those claims.At 10 of the decision, the Court stated that the "Plaintiff is ultimately attempting to patent a range of specific gravities that correlate to an acceptable weight for bowlers. Defendant Brunswick cor-

rectly argues that in order to base a claim of patentability on the precise specific gravity values (0.38 to 1.195) of the encapsulating material is critical and thus produces some unexpected result which differs from that outside the range."

Based on above cited court statements, the court is considering only a portion of claim limitations 24(b) and 32(b) of the '614 patent, rather than all claim limitations of said claims 24 and 32 taken as a whole. A review of the Court's decision will reveal that claim construction was never determined. That is, the proper meaning of claim limitations 24(a), 24(b), 24(d), 32(a), 32(b), and 32(e), where never factually determined when taken as a whole.

The first step in any invalidity or infringement analysis is claim construction. Rockwell International Corp. v. United States, 147 F. 3d at 1362 (1998). Claim construction may require the resolution of factual matters before a claim can be authoritatively construed. Markman v. Westview Instruments, Inc. 34 USPO at 1344 (Fed. Cir. 1995).

Every limitation in a claim must be given effect in order to determine what subject matter the claims define. In re Wilder, 166 U.S.P.O. 545 429 F. 2d 447. Based on established legal precedent, claim limitations 24(a), 24(b), 24(d), 32(a), 32(b), and 32(e) should have been considered as a whole and not ignored. Claim limitations 24(b), 24(d), 32(b) and 32(e) recite functional or process limitations which distinguish the claimed invention over the prior art. Ascription of claim that ascribes function to any of the things it specifies, is a limitation of the claim, and ignoring express functional limitation of the claim would be to create new claim and not interpret the claim granted. Butler et al v. Helms, 193 USPO 81, 82: 550 F. 2d 954. Functional characteristics place additional limitations on claimed product, and therefore must be given weight and not ignored. In re Echerd et al, 176 USPO 321; 471 F. 2d 632. Product claims may be drafted to include process steps to wholly or partially define claimed product. To extent that process limitations distinguish product over prior art, they must

be given same consideration as traditional product characteristics. In re Hallman, 655 F. 2d 212.

Due to the complex technical matter involved, expert testimony should have been used by the Court to interpret the functional or process claim limitations when taken as a whole, in order to set the proper factual foundation for determining obviousness/nonobviousness. The trial judge's failure to allow expert testimony for determining claim construction was an abuse of discretion. Markman v. Westview at 1339. Court in ruling on summary judgement is not to resolve factual issues, but may only determine whether factual issues exist. Bashir v. National R.R. Passenger Corp., affd. 119 F. 3d 929. On motion for summary judgement, court must not weigh evidence or determine truth of matter, but only determine whether there is genuine issue for trial.Crane v. Consco, Inc., 41 F. 3d 547 (1994); Abdul-Jabbar v. General Motors Corp., 85 F. 3d 407 (1996). Judge's function at point of summary judgement is limited to determining whether sufficient evidence has been presented to make issue of fact proper jury question, and not weigh evidence, judge witness credibility, and determine truth of matter. Spence v. Miles Laboratories, Inc., affd. 37 F. 3d 1185.

3. Level of Ordinary Skill in the Art

The District Court stated solely that Brunswick does not contest the fact that Plaintiff's knowledge surpassed the level of skill in the art at time of his invention (A12-A13). Based on said statement, it is apparent that the level of ordinary skill in the art was never factually determined.

It should be noted that the inventor's skill is not determinative in ascertaining whether the invention was obvious to a person having ordinary skill in the art. Custom Accessories, Inc. v. Jeffrey-Allan Ind., Inc., 807 F. 2d at 962 (Fed. Cir. 1986). Since a factual determination of the level of ordinary skill in the art was never resolved by the Court, a proper assessment of obviousness cannot be made, because under the Graham analysis the question involves whether a claimed invention would be obvious at the time the invention was made, to one of ordinary

skill in the art. Custom Accessories, Inc. v. Jeffrey Allan Ind., Inc., 807 F. 2d 955, 962 (Fed. Cir. 1986). The level of skill is a factual question that must be resolved and considered. Ryko Mfg. Co. v. Nu-Star, Inc., 950 F. 2d 718 (Fed. Cir. 1991).

4. Conclusion

Based on presented facts, how can undetermined teachings of the cited prior art provide a suggestion or motivation to a person of undetermined level of skill in the art, to produce an invention of undetermined claim construction. Yet, in the presence of such unknowns, the District Court granted Brunswick summary judgment.

Before a proper determination of obviousness can be made, a proper determination of claim construction and scope and content of the cited prior art, must be correctly made. Otherwise, when erroneously determined prior art is compared with erroneously interpreted claims, findings of difference between the prior art and the claims will necessarily be clearly erroneous. Panduit Corp. v. Dennison Mfg. Co., 810 F 2d 1561.

The District Court's summary judgement action stripped Gentiluomo of his legal rights to a jury trial to have complex technical matter factually considered and resolved. The Seventh Amendment requires that questions of fact shall be settled by a jury, and the Court shall not assume directly or indirectly to take from the jury such prerogative. Markman v. Westview at 1340.

Respectfully submitted,

/s/ Joseph A. Gentiluomo
JOSEPH A. GENTILUOMO, Pro se

Date: 4/9/03

UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

01-1364

JOSEPH A. GENTILUOMO,
Plaintiff-Appellant,

v.

BRUNSWICK BOWLING AND BILLIARDS CORPORATION
(individually and doing business as Brunswick Technology Ventures and as Quantum),

and

COLUMBIA 300, INC.
(individually and doing business as Track, Inc.),

and

PIN BREAKER, INC.
Defendants-Appellees,

and

ROTO-GRIP, INC.
Defendant.

ORDER

United States Court of Appeals for the Federal Circuit

ORDER

Before LOURIE, circuit Judge, PLAGER, Senior Circuit Judge, and DYK, Circuit Judge.

A Petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on July 8, 2002.

FOR THE COURT,
/s/ Jan Horbaly (av)
JAN HORBALY
Clerk

Dated: June 27, 2002

cc: Joseph Gentiluomo
William B. Nash
Stephen G. Kehoe
Michael O. Warnecke

GENTILUOMO V BRUNSWICK BOWLING, 01-1364
(DCT - 96-CV-0544)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record

Appeal No. 01-1364
In the
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOSEPH A. GENTILUOMO,
Plaintiff-Appellant,

v.

BRUNSWICK BOWLING AND BILLIARDS CORPORATION
(individually and doing business as Brunswick Technology Ventures and as Quantum),
and

COLUMBIA 300, INC.
(individually and doing business as Track, Inc.),

and

PIN BREAKERS, INC.
Defendants-Appellees

and

ROTO-GRIP, INC.,
Defendant

Appeal from the United States District Court for the Northern District of New York in 96-CV-544, Judge Lawrence E. Kahn.

REHEARING PETITION FOR PLAINTIFF-APPELLANT

JOSEPH A. GENTILUOMO, PRO SE
1456 BELMONT AVENUE
SCHENECTADY, NEW YORK 12308
(518) 346-0895

I. Introduction

This petition for rehearing is being filed under FRAP 40 and FCR 40, in response to the Appeal Court's opinion filed June 5, 2002.

II. The Argument – Points of Law or Facts Overlooked or Misapprehended by the Appeals Court

A. Law and Facts Misapprehended Regarding Claim Limitations and Cited Prior Art Teachings

The Appeals Court stated that it disagrees with Gentiluomo's weight reallocation argument. That argument is premised on supposed limitations that do not appear in the relevant claims. Gentiluomo contends that the phrase "fixed weight ball" as well as limitations 24(d) and 32(e) support the notion of weight relocation. We do not agree. The phrase "fixed weight ball denotes that the weight does not change over time. It thus does not carry with it the significance attributed to it by Gentiluomo. Moreover, limitations 24(d) and 32(e) convey merely an intended result, rather than structural limitations with respect to a given bowling ball. In any event, the claims do not require a bowling ball whose weight allocations change over time, and the prior art bowling balls of record clearly are "fixed weight balls" as the claims contemplate.

First, it must be ascertained that the Court is giving a wrong connotation to the phrase "fixed weight ball." A review of Gentiluomo's '614 patent will reveal that said phrase is associated with balls during the balls' design phase, not after the ball is constructed. Specifications may be used as a dictionary to determine the meaning of limitation in claim. In re Ogiue, 185 USPQ 227. For example, Col. 2, lines 5-8 of the '614 patent states that "This means that a fixed weight ball of lower moment of inertia will start pure rolling action sooner and poses greater total kinetic energy at the instant pure rolling commences. Col. 2, lines 57-62 states that "Ball moment of inertia in the instant invention is decreased when compared to a presently available prior art bowling ball of

equal weight, by design-wise removing weight from the outer portion of said prior art ball and by various means design-wise redistributing said removed weight to the inner portion of the ball. Based on cited facts, it is apparent that the phrases fixed weight and variable weight balls are not associated with a ball after it is built. It is associated with the constructional concept used in arriving at a specific ball design. (See Gentiluomo brief at 4-6 and 24-25.)

Secondly, it must be ascertained that Gentiluomo's claimed invention definitely conveys the concept that weight is removed from the outer portion to within the inner portion of a fixed weight ball. It should be noted that when the material adjacent to the inner core is characterized as having a specific gravity of 1.195 to 0.38 for a specific fixed weight ball, weight must be moved during the ball's design phase from the outer to within the inner portion of a ball. For example, if you take a 16 pound ball having a specific gravity of 1.195 for the outer portion and then design-wise change the outer portion of a 16 pound ball to have a specific gravity of 0.38, it becomes readily apparent that weight must be design-wise moved from the outer to the inner portion of a ball in order to maintain the 16 pound weight. Also, claim limitation 24(d) is a functional limitation which discloses how the total kinetic energy output of a fixed weight ball is accomplished through a decrease in ball moment of inertia and an increase in inner core density. Ascription of claim that ascribes function to any of the things it specifies, is a limitation of the claim, and ignoring express functional limitation of claim would be to create a new claim and not interpret the claim granted. Butler et al v. Helms, 193 U.S.P.Q. 81, 82. Claim limitation 24(d) recites that ball moment of inertia of said fixed weight ball decreases with an increase in inner core density, to effectuate an increase in total kinetic energy output of said fixed weight ball. The only way the moment of inertia of a fixed weight ball will decrease with an increase in inner core density or weight, is to remove weight from the outer to within the inner

portion of a ball during the ball's design phase. Based on all claim limitations of claim 24 and 32, said claims explicitly and/or implicitly disclose the concept of design-wise removing weight from the outer portion to within the inner portion of a fixed weight ball to effectuate an increase in total kinetic energy output of a ball. All claim limitations must be considered in determining the claim's scope and manner of operation. General Electric Co. v. United States, 198 U.S.P.Q. 65; In re Boe & Duke, 184 U.S.P.Q. 38

E. Conclusions

In concluding, the petitioner would like to mention that he has about 55 years of engineering experience, about 40 years experience in patent law, prosecuted and received 25 patents, has over 22 years of labor and expenditures associated with the patent at issue, and therefore prays that he receives a fair and favorable response from the Court.

Dated:June 12, 2002

/s/ Joseph A. Gentiluomo
JOSEPH A. GENTILUOMO, Pro Se

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

01-1364

JOSEPH A. GENTILUOMO,
Plaintiff-Appellant,

v.

BRUNSWICK BOWLING AND BILLIARDS CORPORATION
(individually and doing business as Brunswick Technology Ventures and as Quantum),
and

COLUMBIA 300, INC.
(individually and doing business as Track, Inc.),
and

PIN BREAKER, INC.
Defendants-Appellees,

and

ROTO-GRIP, INC.
Defendant.

DECIDED: June 5, 2002

Before LOURIE, Circuit Judge, PLAGER, Senior Circuit Judge, and DYK, Circuit Judge

LOURIE, Circuit Judge

DISCUSSION

We review a district court's grant of summary judgment de novo reapplying the same standard used by the district court. Ethicon Endo-Surgery, Inc. v. United States Surgical Corp., 149 F.3d 1309, 1315, 47 USPQ2d 1272, 1275 (Ded. Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration. McKay v. United States, 199 F.3d 1376, 1380 (Fed. Cir. 1999).

A determination that a patent is valid typically involves a two-step process. First, the court determines the scope and meaning of the patent claims at issue. Smith Indus. Med. Sys., Inc. v. Vital Signs, Inc., 183 F.3d 1347, 1353, 51 USPQ2d 1415, 1418-19 (Fed. Cir. 1999). That step, claim construction, is an issue of law, Markman v. Westview Instruments, Inc., 52 F.3d 967, 970-71, 34 USPQ2d 1321, 1322 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370 (1996), that we review de novo, Cybor Corp. v. FAS Techs., Inc. 138 F.3d 1448, 1454, 46 USPQ2d 1169, 1172 (Fed. Cir. 1998) (en banc) (citations omitted). When an asserted ground of invalidity is anticipation under 35 U.S.C. § 102 or obviousness under 35 U.S.C. § 103, the second step involves a comparison of the asserted claims with the prior art. Whether a claim would have been obvious at the time of the invention is a question of law based on underlying findings of fact. Smiths, 183 F.3d at 1354, 51 USPQ2d at 1419-20 (citing Graham v. John Deere Co., 383 U.S. 1 17-18 (1966). We review a district court's underlying findings of fact for clear error, while we rule de novo on the ultimate issue of obviousness. Id. at 1355. Because an issued patent is presumed to be valid, 35 U.S.C. § 282 (1994), the evidentiary burden to

show facts supporting a conclusion of invalidity is clear and convincing evidence, WMS Gaming Inc. v. Int'l Game Techs., 184 F.3d 1339, 1355, 51 USPQ2d 1385, 1396-97 (Fed. Cir. 1999).

We first address Gentiluomo's arguments that his invention would not have been obvious because it relocates the weight of a fixed weight ball from the encapsulating mass to the inner core, and that certain prior art taught away from that concept by teaching bowling balls with light cores and heavy shells. First, we disagree with Gentiluomo's weight-reallocation argument. That argument is premised on supposed limitations that do not appear in relevant claims. Gentiluomo contends that the claim "fixed weight ball" as well as limitation (d) of claim 24 and limitation (e) of claim 32 support the notion of weight relocation. We do not agree. The phrase "fixed weight ball" denotes that the weight of the ball does not change over time; it thus does not carry with it the significance attributed to it by Gentiluomo. Moreover, limitation (d) of claim 24 and limitation (e) of claim 32 convey merely an intended result, rather than structural limitations with respect to a given bowling ball. In any event, the claims do not require a bowling ball whose weight allocation changes over time, and the prior art bowling balls of record clearly are "fixed weight balls" as the claims contemplate. Secondly, we disagree with Gentiluomo's argument that the prior art teaches away from the invention. Gentiluomo selectively cites prior art that might be considered to teach away from his invention, but the most pertinent prior art, that of record, does not do so. The Randolph Classic and Fab I balls, unlike the art cited by Gentiluomo to support his argument. are bowling balls having relatively heavier inner cores and therefore decreased moments of inertia. Moreover, balls with light cores and heavier shells do not necessarily teach away from the claimed balls.

App. 28

Appeal No. 01-1364

In the
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Defendant

Appeal from the United States District Court for the Northern District of New York in 96-CV-544, Judge Lawrence E. Kahn.

BRIEF FOR PLAINTIFF-APPELLANT

JOSEPH A. GENTILUOMO, PRO SE
1456 BELMONT AVENUE
SCHENECTADY, NEW YORK 12308
(518) 346-0895

VI. Summary of the Argument

A review of the District Court's Memorandum - Decision and Order will reveal that the Court erred in holding Gent.'s '614 patent invalid based on obviousness, as it failed to correctly resolve the factual teachings of the '614 patent and the cited prior art taken as a whole, failed to correctly resolve the findings of fact regarding the issue of "criticality" contrived by Bruns., failed to correctly ascertain the relevant teachings of the cited prior art, failed to correctly ascertain whether there was a patentable difference between the cited prior art and the invention claimed in the '614 patent, failed to ascertain that Bruns. did not meet its burden of proof for establishing that it is entitled to judgment based on obviousness, failed to ascertain the non-existence of genuine issues of material fact regarding Gent.'s cross-motion for summary judgment based on non-obviousness, failed to give proper weight to the statutory presumption of patent validity, and failed to ascertain the inventive contribution made to the art by Gent.'s claimed invention.

A. Consideration of the Teachings of the '614 Patent and the Cited Prior Art Taken as a Whole.

In determining whether a patent is invalid for obviousness, fact finder must determine whether patent challenger has established by clear and convincing evidence that claimed invention as a whole would have been obvious from the perspective of a person of ordinary skill in the art at time invention was made. Spalding & Evenflo Companies, Inc. v. Acushnet Co., 13 U.S.P.Q. 2d 1081. A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would teach away from the claimed invention. W.L. Gore & Associates, Inc. v. Garlock, Inc., 220 U.S.P.Q. 303

Since the '614 patent teaches that the material specific gravity adjacent to the inner core can range from 1.195 to 0.38 (A 118), the encapsulating mass will be classified as "variable density."

Since the '614 patent teaches that the weight design-wise

removed from the encapsulating mass of prior art balls is design-wise relocated within the inner core, such that the inner core has a minimum specific gravity of 0.1063 or 0.1625 per pound of ball weight *(A118)*, the inner core is classified as a "variable density or weight" inner core. Since the '614 patent teaches that the weight design-wise removed from the encapsulating mass is design-wise relocated within the inner core, ball weight remains fixed, and therefore classified as a fixed weight ball. *(A114)*

Since the prior art teaches that inner core density or weight is varied in order to obtain different weight balls *(A252-A253; A268-A269; A282, A283, A284)*, the encapsulating mass must be deemed "fixed density or weight," and the ball as "variable weight" *(A254-A255)*

(2) Non-obviousness of Gent.'s Claimed Invention Over Cited Prior Art When Taken as a Whole

In Gent.'s patented invention, the magnitude of the density or weight of the inner core is dependent on the magnitude of the encapsulating mass specific gravity when varied between the claimed range of 1.195 to 0.38, for a specific fixed weight ball. In the cited prior art balls, the magnitude of the density or weight of the inner core is dependent solely on the weight of ball desired. *(A268-A269; A249-A250, A255)*.

(1) Scope and Content of Cited Prior Art

(a) Teachings of the Fab I and Rand. Classic Bowling Balls

It is apparent that Bruns. is merely blowing smoke, because the Rand. Classic and Fab I balls, in and of themselves, definitely cannot teach nor suggest Gent.'s claimed range of 1.195 to 0.38. Cited balls teach only of a fixed density value for the cover material, which is fixed at 1.213 for the Fab I ball and 1.219 for the Rand. Classic ball. How can a ball with a fixed specific gravity cover teach or suggest a lower specific gravity of 1.195 to 0.38? *(A255-A256; A271-A272; A284-A285; A290)*.

(b) Teachings of Rand.'s U.S. Pat. No. 4,264,071

Without supporting evidence, Bruns. stated that Rand. contemplates the use of all core and cover material densities that result in a reduced moment of inertia, and therefore teach the claim lim.'s 24(a), 32(a) and 45(a). (*A219*).

It should be noted that Bruns. did not indicate, by reference to supporting evidence of record, its unsupported allegations. For example, where does the '071 patent teach an inner core having a minimum specific gravity of 0.1063 or 0.1625 per pound of ball weight for balls ranging in weight from 8 to 16 pounds. Also, where does the '071 patent teach a specific gravity range of 1.195 to 0.38 for the cover material.

(c) Teachings of Rand.'s U.S. pat. No. 4,131,277

Bruns. stated that Rand. '277 contemplated the use of a higher density core to obtain a lower moment of inertia well before Gent. ever filed his patent application. (*A151; A222*). Bruns.' expert witness, Thomas P. Kicher, represented that he disagreed with Gent.'s statement that "column 6, lines 5-12 of Rand. '277 teaches a ball having a core of lighter material than that which surrounds it, to reduce the moment of inertia of the ball." Mr. Kicher indicated that the above cited disclosure represents a description applicable to Rand. '369, and not the teachings of Rand. '277 (*A212-A213*)

Since the above remarks of both Bruns. and Mr. Kicher

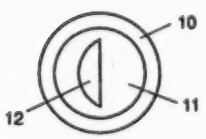

Fig. 1

Fig. 2

Fig. 4

Fig. 3

are obviously erroneous, the '369 and the '277 patents must be thoroughly and properly analyzed to factually determine what they truly disclose. Therefore, the following analysis is presented.

12 – Heavy Segment
Rand. '369

12 – Heavy or Light Segment
Rand. '277

Rand. '369 discloses in column 2 that weighted portion 12 is made of hard rubber or synthetic resin material contain-

ing a loading material such as finely ground barytes.

Rand. '277 discloses in column 2 that segment 12 can be made of plastic material of either especially heavy or especially light material.

It should be noted that the Fig.'s 1 and 2 weighted core embodiments depicted and described in Rand. '369 are structurally identical respectively to the Fig.'s 4 and 3 weighted core embodiments depicted and described in Rand. '277. This indicates that the weighted core embodiments of both the '369 and '277 patents must yield balls with identical characteristics. Therefore, the statement in Col. 5, lines 65-68 and Col. 6, line 1 of the '277 patent that "In my prior U.S. Pat. No. 3,865,369 I showed how the performance of a ball could be altered by making a weighted core or insert in such a shape that a major part of its mass is close to the surface so as to enhance the moment of inertia of the ball, applies to the weighted core embodiments of both the '369 and the '277 patents. Since the '369 patent does not teach of a lightweighted core, it is apparent that the statement in Col. 6, lines 5-8 of the '277 patent that "The opposite effect can be attained by making such a core of lighter material than that which surrounds it to reduce the moment of inertia of the ball," applies solely to the lightweight core embodiment depicted and described solely in the '277 patent. *(A293-A294; A273)*. Therefore, a person skilled in the art will ascertain that the '277 patent teaches that a reduction in moment of inertia is attained by making the core 12 of lighter weight material than that which surrounds it. Note that this is counter to what Gent.'s '614 patent discloses.

(2) Differences Between Cited Prior Art and Claims at Issue

Bruns. stated that the only difference between the prior art and the '614 patent is the recitation of an inner core specific gravity of 0.1625 or 0.1063 per pound of ball weight, and an encapsulating mass specific gravity of 1.195 to 0.38 for a specific fixed weight ball weighing between 8 to 16

pounds (*A152*). Also, Bruns. stated that the only difference between claim elements 24(b) and 32(b) and the Fab I and Rand. Classic balls is the specific gravity range of from 0.38 to 1.195 (*A193*).

A review of the record will reveal that there exists greater patentable differences between the '614 patent claims and the teachings of the prior art, over and beyond the differences acknowledged by both Bruns. and the Court. Claim lim.'s 24(b), 24(d), 32(b) and 32(e) recite functional limitations of claimed structure which distinguish over cited prior art, and therefore should not be ignored (*A256; A272; A295*). Ascription of claim that ascribes function to any of the things it specifies, is a limitation of the claim, and ignoring express functional limitation of claim would be to create a new claim, and not interpret the claim granted. Butler et al v. Helms, 193 U.S.P.Q. 81, 82. In order for the claimed invention to be deemed obvious, the prior art must teach all of the '614 patent claim limitations. In re Royka, 490 F. 2d 981.

(3) Level of Ordinary Skill in the Art

Bruns. stated that the level of skill of a person having ordinary skill in the art is one who has rudimentary knowledge of the basic fundamentals of mechanics and bowling ball construction. Gent. holds a Bachelor's Degree in Mechanical Engineering from Rensselaer Polytechnic Institute, and thus has more than the required rudimentary knowledge *(A149)*.

The District Court stated that Bruns. does not contest the fact that Plaintiff's knowledge surpassed the level of skill in the art at time of his invention (*A12-A13*).

(b) Difference Between Claims at Issue and the Fab I & Rand. Classic Balls

Gent. claims an inner core minimum specific gravity of 0.1063 and 0.1625 per pound of ball weight for balls ranging in weight from 8 to 16 pounds, and material adjacent to the inner core that is characterized as having a specific gravity ranging from 1.195 to 0.38 for a specific fixed weight ball within said ball weight range (*A118*).

Bruns. stated that "From the above discussion of the prior art and from the claim chart attached hereto as Exhibit G, it is clear that the only difference between the prior art and the '614 patent is the recitation of an inner core specific gravity of 0.1625 or 0.1063 per pound of ball weight, and an encapsulating mass specific gravity of 1.195 to 0.38 for a specific fixed weight ball weighing between 8 to 16 pounds" (*A152*).

The District Court stated that the primary difference between the prior art and claims 24 and 32 in the Patent are the precise specific gravity range set forth in those claims (*A16*).

Gent. contends that since the Rand. Classic and Fab. I balls reveal only fixed density covers, fixed at 1.219 and 1.213 respectively, it is apparent that said balls cannot teach nor suggest a cover specific gravity ranging from 1.195 to 0.38. Also, since the Rand. Classic ball reveals only the specific gravity of 2.468 for the center of a 15 pound ball, and the Fab. I ball reveals only the specific gravity of 2.151 for the center of a 16 pound ball, it is apparent that said balls cannot teach nor suggest a minimum specific gravity of 0.1625 or 0.1063 per pound of weight, for balls ranging in weight from 8 to 16 pounds. (*A255-A256; A271-A272; A284-A285; A290*) The claim recitation "for balls ranging in weight from 8 to 16 pounds," is part of claim lim.'s 24(a), 32(a) and 45(a), and therefore cannot be ignored. All words in a claim must be considered in judging the patentability of the claim against prior art. In re Wilson, 424 F. 2d 1382. When evaluating claims for obviousness under 35 U.S.C. 103, all the claim limitations must be considered and given weight. Ex parte Grasselli, 231 U.S.P.Q. 393.

DATED; Nov. 23, 2001

/s/ Joseph A. Gentiluomo
JOSEPH A. GENTILUOMO, PRO SE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH A. GENTILUOMO,
Plaintiff,

v.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, individually d.b.a Brunswick Technology Ventures d.b.a. Quantum; COLUMBIA 300, INC., Individually d.b.a. Track, Inc.; PIN BREAKERS, INC.; AND ROTO-GRIP, INC.
Defendants.
BRUNSWICK BOWLING & BILLIARDS CORPORATION, d.b.a. Quantum, d.b.a. Brunswick Technology Ventures
Counter-claimant,
JOSEPH A. GENTILUOMO,
Counter Defendant,
COLUMBIA 300, INC., d.b.a. Track Inc.,
Counter-claimant
JOSEPH A. GENTILUOMO,
Counter-defendant,
PIN BREAKERS, INC.
Counter-claimant
JOSEPH A. GENTILUOMO,
Counter-defendant,

FINAL JUDGMENT

96-cv-544 (LEK/RWS)

U.S. DISTRICT COURT
N.D. OF N.Y.
ORIGINAL FILED
APR 17, 2001
LAWRENCE K. BAERMANN,
CLERK
ALBANY

FINAL JUDGMENT

In accordance with this Court's November 1, 1999 and December 7, 2000 memorandum Decisions and Orders, Plaintiff's claims alleged in the Complaint against all Defendants are dismissed, the Defendants' Counterclaims against Plaintiff are granted to the extent that the Patent Claims in Suit are declared to be invalid, and the Defendant's counterclaims are otherwise dismissed without prejudice. The parties shall bear their own costs and attorneys' fees.

Accordingly, it is hereby

ORDERED that the Clerk of the Court serve a copy of this Order to all parties by regular mail.

IT IS SO ORDERED.

/s/ Lawrence E. Kahn
LAWRENCE E. KAHN
United States District Judge

Dated: April 17, 2001
Albany, New york

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH A. GENTILUOMO,
Plaintiff,

v.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, individually d.b.a Brunswick Technology Ventures d.b.a. Quantum; COLUMBIA 300, INC., Individually d.b.a. Track, Inc.; PIN BREAKERS, INC.; AND ROTO-GRIP, INC.
Defendants.
BRUNSWICK BOWLING & BILLIARDS CORPORATION, d.b.a. Quantum, d.b.a. Brunswick Technology Ventures
Counter-claimant,
JOSEPH A. GENTILUOMO,
Counter Defendant,
COLUMBIA 300, INC., d.b.a. Track Inc.,
Counter-claimant
JOSEPH A. GENTILUOMO,
Counter-defendant,
PIN BREAKERS, INC.
Counter-claimant
JOSEPH A. GENTILUOMO,
Counter-defendant,

96-cv-544
(LEK/RWS)

U.S. DISTRICT COURT
N.D. OF N.Y.
ORIGINAL FILED
Nov. 1, 1999
LAWRENCE K. BAERMANN,
CLERK
ALBANY

MEMORANDUM – DECISION AND ORDER

II. ANALYSIS

A. Motions for Summary Judgment

1. Standard for Summary Judgment

Both Plaintiff and defendant Brunswick have moved for summary judgment as to the validity of the patent.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A patent is invalid on nonobviousness grounds if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. See 35 U.S.C. § 103. The test for obviousness entails four factual determinations: "(1) the scope and content of the prior art; (2) the difference between the claims and the prior art; (3) the level of ordinary skill in the pertinent art; and (4) secondary considerations, if any, of nonobviousness." Uniroyal, Inc. v. Rudkin Wiley Corp., 837 F. 2d 1044, 1050 (Fed. Cir. 1988); see also Graham v. John Deere Co., 383 U.S. 1, 17 (1966).

a. Level of Ordinary Skill in the Pertinent Art

Under Graham, the court must first consider the scope and content of prior art. The relevant art is defined as that "reasonably pertinent to the particular problem with which the inventor was involved." Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1535 (Fed. Cir. 1983) (citations ommited). In this case, the inventor was concerned with designing a bowling ball with superior control and accuracy. thus, the scope of the relevant art is that reasonably pertinent to the mechanics of bowling ball design. Plaintiff holds a Bachelor's Science degree from Rensselaer Polytechnic Institute of Troy, New York, and pur-

sued advanced study in mechanical engineering, and defendant Brunswick does not contest the fact that Plaintiff's knowledge surpassed the level of skill in the art at the time of his invention.

b. Scope and Content of prior Art

The combined teachings of prior art as a whole must be considered in determining whether an invention is actually obvious and therefore unfit for patent. E.W.P. Corp. v. Reliance Universal Inc., 755 F.2d 898, 906 (Fed. Cir.), cert. denied, 474 U.S. 843 (1985). In determining whether obviousness is established by combining the teachings of the prior art, "'the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.'" Cable Elec. Prods., Inc. v. Genmark, Inc. 770 F.2d 1015, 1025 (Fed. Cir. 1985) (quoting In re Keller, 642 F.2d 413, 425(C.C.P.A. 1981)). Furthermore, to invalidate claimed subject matter for obviousness, the combined teachings of the prior art references must suggest, expressly or by implication, the improvements embodied by the invention. In re Sernaker, 702 F.2d 989 (Fed. Cir. 1983); see also In re GPAC, Inc., 57 F.3d 1573, 1577 (Fed. Cir. 1995).

Any bowling ball that was in use or for which a patent existed prior to Plaintiff's filing date on October 31, 1990, falls within the domain of prior art. See 35 U.S.c. §§ 102(b), 102(d). Defendant Brunswick points to four bowling balls that were either in use or for which patents existed prior to Plaintiff's filing date. The prior art clearly shows that others had described balls with inner cores having a higher density that the outer cores. Plaintiff contends that these other balls failed to teach or suggest their own structural limitations, whereby a minimum specific gravity of the inner core is determined on the basis of per pound ball weight. Since no mention of varying specific gravity values of the encapsulating mass is made in the prior art, Plaintiff maintains that the prior art fails to articulate motivation behind the Patent, which enables the manipulation of the ball's moment of inertia without changing the final weight of

the ball. Indeed, the prior art was limited to manipulation of the inner core, and the weight of the ball was dictated by the size and density of that inner core.

The fact that a patent is an improvement over other prior art references will not necessarily save it from a finding of invalidity. It matters not that Plaintiff's bowling ball would in theory operate better than the prior art bowling balls, if the improvement would have been obvious to those of ordinary skill in the art at the time of the invention. What matters is that the gap between prior art and what is being claimed must be sufficiently great as to render the latter nonobvious. It is clear that obviousness does not require predictability, but a reasonable expectation of success is necessary. In re Clinton, 527 F.2d 1226, 1228 (C.C.P.A. 1976).

Plaintiff is ultimately attempting to patent a range of specific gravities that correlate to an acceptable weight for bowlers. Defendant Brunswick correctly argues that in order to base a claim of patentability on the precise specific gravities of the ball's component materials, Plaintiff must demonstrate that the claimed range of specific gravity values (0.38 to 1.195) of the encapsulating material is critical and thus produces some unexpected result which differs from that outside the range. See In re Geisler, 116 F.3dc 1465, 1470 (Fed. Cir. 1997); In re Huang, 100 F.3d 135, 136 (Fed. Cir. 1996). Plaintiff is unable to demonstrate the criticality for the claimed range:

c. Difference Between Claims and Prior Art

The primary difference between the prior and claims 24 and 32 in the Patent are the precise gravity ranges set forth in those claims. As explained above, Plaintiff fails to demonstrate how that particular range is critical to the invention such that it produces "unexpected results relative to the prior art range." In re Woodruff, 919 F.2d 1575, 1578 (Fed. Cir. 1990) (citations omitted).

d. Secondary Considerations

The allegedly infringing bowling balls clearly achieved commercial success, and advertisements for those balls empha-

sized the very factors that Plaintiff claims motivated his invention. Nevertheless, these elements provide insufficient grounds to sustain validity of the Patent.

The Patent is therefore invalid on nonobviousness grounds.

Accordingly, it is hereby

ORDERED that defendant Brunswick's motion for summary judgment on the grounds of nonobviousness is GRANTED and the case DISMISSED in its entirety against defendant Brunswick;

ORDERED that Plaintiff's motion for summary judgment is DENIED;

FURTHER ORDERED that the Clerk of the Court serve a copy of this order on all parties by regular mail.

IT IS SO ORDERED.

/s/ Lawrence E. Kahn
LAWRENCE E. KAHN
United States District Judge

Dated: November 1, 1999
Albany, New York

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH A. GENTILUOMO	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	96-CV-0544
vs.	)	
	)	LEK/RWS
BRUNSWICK BOWLING &	)	
BILLIARDS CORPORATION,	)	Judge:
individually and doing business as	)	Lawrence E. Kahn
BRUNSWICK TECHNOLOGY	)	
VENTURES and doing business as	)	
QUANTUM, COLUMBIA 300, INC.,	)	
individually, and doing business as	)	
TRACK, INC., PIN BREAKERS,	)	
INC., AND ROTO-GRIP, INC.	)	
	)	
Defendants	)	

BRUNSWICK'S RESPONSE TO GENTILUOMO'S STATEMENT OF UNCONTESTED FACTS IN OPPOSITION TO GENTILUOMO'S CROSS-MOTION FOR SUMMARY JUDGMENT OF PATENT VALIDITY

Pursuant to Local Rule 7.1(a)(3), defendant Brunswick Bowling & Billiards Corporation ("Brunswick") herewith responds to the Statement of Uncontested Facts Pursuant to Local Rule 7.1(f) (hereinafter "Plaintiff's Statement") submitted by plaintiff Joseph A. Gentiluomo ("Gentiluomo") in support of his cross-motion for summary judgment of non-obviousness.

Plaintiff's Statement No. 7:

7. The Fab I bowling ball, Gentiluomo Aff., Exhibit "H," teaches only that the 16 pound ball has an inner core specific gravity of 2.151. Since the Fab I bowling ball cannot teach of a

specific gravity per pound of ball weight for balls ranging in weight from 8 to 16 pounds, the Fab I ball does not teach Plaintiff's claim limitations 24(a), 32(a) and 45(a).

Brunswick's Response to Statement No. 7:

Denied. Gentiluomo's opinion that the Fab I bowling ball cannot teach a specific gravity per pound of ball weight for ball's ranging in weight from 8 to 16 pounds is directly contrary to the position taken by him in his reissue application. During prosecution of that reissue application, Gentiluomo stated that the Fab I ball anticipated claims 1 and 12 of his U.S. Patent 5,098,096 (Exh. I to Brunswick's Memorandum in Support of Summary Judgment, page 2, Reissue Declaration of Gentiluomo). Gentiluomo's admission before the U.S. Patent and Trademark office during the prosecution of the'614 Patent means that the Fab I ball does expressly disclose his claim limitations 24(a), 32(a) and 45(a).

Plaintiff's Statement No. 8:

8. The Fab I bowling ball teaches only that the material adjacent to the inner core of the 16 pound ball is made of a fixed weight density polyester that has a specific gravity of 1.213. Since the Fab I ball cannot teach of an adjustable density range from 1.195 to 0.38, for the purpose of effectuating a decrease in ball moment of inertia, the Fab I ball cannot teach Plaintiff's claim limitations 24(b) and 32(b).

Brunswick's Response to Statement No. 8:

Denied. Gentiluomo has represented that the material adjacent to the inner core of the Fab I bowling ball was analyzed and had a specific gravity of 1.213. This does not mean that the material around the core could not have either higher or lower specific gravity values, as desired, because Gentiluomo's '614 Patent concedes that polyester has densities ranging form 1.05 to 1.46. This range of densities overlaps the range of encapsulating mass densities found in claim limitations 24(b) and 32(b) and therefore fully anticipates and renders unpatentable these claim limitations.

Plaintiff's Statement No. 9:

9. The Fab I bowling ball, in and of itself, cannot teach the

inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 24(d).

Brunswick's Response to Statement No. 9:

Denied. Brunswick incorporates its responses to paragraphs, Nos. 7 and 8 above, as fully set forth herein. The matters set forth in Gentiluomo's statement 9 are expressions of opinion, not fact, and consequently Brunswick is not obligated to further respond. Furthermore, Gentiluomo admitted in his reissue Declaration that the Fab I bowling ball anticipated this claim limitation. (See Exh. I to Brunswick memorandum, page 2, Gentiluomo's Reissue Declaration).

Plaintiff's Statement No. 10:

10. The Randolph Classic bowling ball, Gentiluomo Aff., Exhibit "H," teaches only that the 15 pound ball has an inner core specific gravity of 2.468. since the Randolph Classic ball cannot teach a specific gravity per pound of ball weight, for balls ranging in weight from 8 to 16 pounds, said ball does not teach Plaintiff's claim limitations 24(a), 32(a) and 45(a).

Brunswick's Response to Statement No.10:

Denied. The minimum specific gravity in claim limitation 24(a) is 0.1625, and in claim limitations 32(a) and 45(a) is 0.1063 per pound of ball weight. Based on the 15 pound weight of the Randolph Classic ball and the core specific gravity of 2.468, the specific gravity of the Randolph Classic ball core, per pound of weight, is 0.1645, which is calculated using Gentiluomo's method set out in col. 5, lines 54 to 56 of the '614 Patent. Thus, the Randolph Classic ball fully anticipates and renders unpatentable the minimum specific gravity requirements of claim limitations 24(a), 32(a) and 45(a).

Plaintiff's Statement No.11:

11. The Randolph Classic bowling ball teaches only that the material adjacent to the inner core of the 15 pound ball is made of a fixed density polyester that has a specific gravity of 1.219. Since the Randolph Classic ball cannot teach of an adjustable density ranging from 1.195 to 0.38, for the purpose of effectuating a decrease in ball moment of inertia, the ball cannot teach

Plaintiff's claim limitation of 24(b) and 32(b).

Brunswick's Response to Statement No. 11:

Denied, Gentiluomo has represented that this specific Randolph ball had material adjacent to the inner core with a measured specific gravity of 1.219. This does not mean that the material around the core could not have either higher or lower specific gravities as desired. Because Gentiluomo's '614 Patent concedes that polyester has densities ranging from 1.05 to 1.46, which range of densities overlaps the range of encapsulating mass densities found in claim limitations 24(b) and 32(b), these limitations are fully met by the prior art and are unpatentable.

Plaintiff's Statement No. 12:

12. The Randolph Classic bowling ball, in and of itself, cannot teach the inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 24(d).

Brunswick's Response to Statement No. 12:

Denied. Brunswick incorporates its responses to statements 10 and 11 as is fully set forth herein. The matters set forth in Gentiluomo's statement 12 are expressions of opinion, not fact, and consequently Brunswick is not obligated to respond further. To the extent that any response is deemed required, Gentiluomo admitted in his reissue declaration that the Randolph Classic bowling ball anticipated claim limitation 24(d). (See Exh I to Brunswick's Memorandum, pate 2, Gentiluomo Reissue Declaration).

Plaintiff's Statement No. 15:

15. The Fab I bowling ball, in and of itself, cannot teach the inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 32(e).

Brunswick's Response to Statement No. 15:

Denied. Brunswick incorporates its responses numbers 8 and 9 as is fully set forth herein. The matters set forth in Gentiluomo's statement 15 are expressions of opinion, not fact, and consequently Brunswick is not obligated to further respond. to the extent that any response is deemed required, Gentiluomo has admitted that the Fab I ball was a ball having a moment of inertia

that decreased with an increase in the inner core density for the purpose of obtaining an increase in the total kinetic energy output of the ball. Thus Gentiluomo has admitted that the substance of claim limitation 32(e) was anticipated by the Fab I ball. (Brunswick's Exh. E, Gentiluomo Dep at 114-15).

Plaintiff's Statement No. 16:

16. The Randolph Classic bowling ball, in and of itself, cannot teach the inventive concept behind Plaintiff's patented invention, such as to meet claim limitation 32(e).

Brunswick's Response to Statement No. 16:

Denied. Brunswick incorporates its response numbers 10 and 11 as is fully set forth herein. The matters set forth in Gentiluomo's statement 16 are expressions of opinion, not fact, and consequently Brunswick is not obligated to further respond. To the extent that any response is deemed required, Gentiluomo has admitted that the Randolph Classic I ball was a ball having a moment of inertia that decreased with an increase in the inner core density for the purpose of obtaining an increase in the total kinetic energy output of the ball. Thus Gentiluomo has admitted that the substance of claim limitation 32(e) was anticipated by the Randolph Classic I ball. (Brunswick's Exh. E, Gentiluomo Dep at 114.15).

Date: March 8, 1999

Respectfully submitted,

/s/ Donald W. Rupert

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BOWLING & BILLIARDS

Supreme Court, U.S.
FILED
MAR 5 - 2004
OFFICE OF THE CLERK

No. 03-839

In the

Supreme Court of the United States

In re, JOSEPH A. GENTILUOMO,
Petitioner,

BRUNSWICK BOWLING AND BILLIARDS CORPORATION
(Individually and doing business as Brunswick
Technology Ventures), and as Quantum
and
COLUMBIA 300, INC.
(Individually and doing business as Track, Inc.),
and
PIN BREAKER INC.,
Respondents.

PETITION FOR WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR REHEARING

JOSEPH A. GENTILUOMO, PRO SE
1456 BELMONT AVENUE
SCHENECTADY, NEW YORK 12308
(518) 346-0895

The Petitioner, Joseph A. Gentiluomo, requests that his "Petition For Writ Of Mandamus" be reconsidered, due to the extraordinary circumstances prevailing in this case. The extraordinary circumstances pertain to the lower courts' **violation** of both Federal Circuit and Supreme Court precedential laws, regarding **critically important issues**.

As stated in the writ of mandamus, the District Court **violated** well established precedential case laws of Graham v. John Deere and McKay v. United States, by failing to **legally consider** the claimed invention taken as a whole, and Gentiluomo's cross-motion for summary judgement.

The Appeals Court stated at 6 of its June 5, 2002 decision that it reviews a District Court's grant of summary judgement de novo, reapplying the same standard used by the District Court. Citing Ethicon Endo-Surgery, Inc. v. United States Surgical Corp., 149 F. 3d 1303,1315(1998). Also, at 7 the Court stated that it reviews a District Court's underlying findings of fact for clear error, while it rules de novo on the ultimate issue of obviousness. If this is the case, why didn't the Appeals Court ascertain that the District Court **never made a proper legal determination** regarding the standard of review for determining obviousness, as enunciated by the Supreme Court in Graham v. John Deere; and the standard of review for considering cross-motions as enunciated by the Circuit Court of Appeals in McKay v. United States? Had the Court done so, it would have noted that the District Court presented **no factual findings, whatsoever**, upon which to base a **legal determination** regarding above cited **critical issues**. So, how can the Appeals Court infer that it made a **de novo** determination based on **factual findings that were never made in District Court**? Where the District Court, in violation of the federal rules of civil procedure, fail to determine the essential facts upon which it based its judgement, the Court of

Appeals cannot make such findings of fact. Bay Sound Transp. Co. v. U.S., 410 F. 2d 505(1969).

To compensate for the District Courts' lack of factual findings, the Appeals Court at 9 of its June 5, 2002 decision, **inappropriately made factual findings that were never made by the District Court**. This constitutes a **flagrant legal error,** since the District Court never determined the scope and meaning of the claims at issue. As stated in the mandamus petition, the **appellate court of the federal system neither inherently nor by grant, express or implied, have the power to make factual findings**. Randall Foundation, Inc. v. Riddell, 244 F. 2d 803 (1957). Where the trial court made no findings on certain issues, the Court of Appeals could not make such findings, even if it were possible upon the record. Deering-Milliken & Co. v. Moder-Aire of Hollywood, Inc., 231 F. 2d 623(1956). Based on presented facts, who is supposed to adjudicate such **flagrant violations of established precedential laws,** when the Supreme Court refrains from passing judgement on such important critical issues?

Another **critical** legal issue pertains to the Appeal Court's denial of Gentiluomo's writ of mandamus based on Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1,9 n. 6 (1983). The Appeals Court **flagrantly abused its discretion** when it decided the mandamus issue in a way that **highly conflicts** with the decision rendered by the Supreme Court in the above cited case law of Hospital v. Mercury. As stated a 15-16 of Gentiluomo's mandamus petition, the legal precedent set forth in the Hospital v. Mercury, which was relied upon by the Court of Appeals in the denial of the petition at issue, **does not apply** to the prevailing circumstances associated with Gentiluomo's petition. Gentiluomo presented evidence why Hospital v. Mercury was an erroneous case law upon which to deny

Gentiluomo's writ of mandamus. Yet, in spite of the Appeal Court's **outright violation** in the use of Hospital v. Mercury, the Supreme Court elected not to resolve the **critical legal issue** as to whether or not the Appeals Courts' denial of Gentiluomo's writ of mandamus was erroneous, because it was based on inapplicable case law.

The Court should also consider that pursuant to Supreme Court Rule 15(2) a waiver for filing a brief in opposition to Gentiluomo's petition for writ of mandamus, must be treated as a binding admission that the Respondent's have no argument toward a denial of said petition, and further that they perceive **no misstatements of both fact or law** in said petition. This means that the Respondent's have **conceded** that **factually and legally** the Petitioner's arguments regarding the lower courts' **violation of precedential case laws,** through a neglect to perform legally required nondiscretionary duties mandated in Graham v. John Deere and McKay v. United States, **are true.**

By refraining to adjudicate the herein cited **critical legal issues,** the Supreme Court is essentially **condoning** the lower courts **violation** of both **Federal Circuit and Supreme Court law.** This, in essence, is giving corporations an open invitation to outright **steal** an independent inventor's patented invention, such as to make a **farce** out of the United States patent system.

Since the Supreme Court elected not to hear the instant case, who is left to provide supervisory authority over lower courts, in order to ascertain whether precedential case laws were violated in decisions rendered? Are the lower courts above the law, such that they can violate any law they please, and not be held accountable for their actions? Alabama Supreme Court Chief Justice Roy Moore was held accountable for his actions for violating the law. Therefore, it is not

understood why the United States Supreme Court is not interested in holding the federal court judges involved in this case accountable for their actions for violating Federal Circuit and Supreme Court laws, listed infra. There appears to be something drastically wrong with the United States judicial system, especially since judges were sworn to uphold the law. The Supreme Court's decision to deny writ of mandamus, sends a **disturbing message** that **judicial misconduct** by lower courts is acceptable, and does not fall within the jurisdiction of the Supreme Court. Supreme Court Rule 10 indicates that a **violation of the law** by lower courts, falls within the jurisdiction of the Supreme Court.

In the instant case, the lower courts **flagrantly violated** precedential case laws of Graham v. John Deere; McKay v. United States; Ethicon Endo-Surgery, Inc. v. United States Surgical Corp.; Bay Sound Transp. Co. v. U.S.; Randall Foundation Inc. v. Riddell; Deering-Milliken & Co. v. Moder-Aire of Hollywood, Inc.; and Hospital v. Mercury.

It is **inconceivable** that the Supreme Court has no interest in hearing a case that exhibits **judicial misconduct** through **a clear abuse of discretion** by lower courts, regrading **flagrant violations** of **all** the above cited case laws. **Based on presented facts, how is a person supposed to obtain justice, when he has no other legal means available to him, and the Supreme Court exhibits no interest in rectifying the cited flagrant abuse of judicial power displayed by the lower courts?**

A writ is appropriately issued when there is an usurpation of judicial power, or a clear abuse of discretion. Schlagenhauf v. Holder, 379 U.S. at 110. Function of mandamus is to correct an abuse of judicial power, or a refusal to correct it. Roche v. Evaporated Milk Association, 319 U.S. at 31.

Supreme Court of the United States

Certification of Petitioner

The Petitioner Joseph A. Gentiluomo, certifies that his petition for rehearing is restricted solely to the grounds specified in the Supreme Court Rule 44(2), and is presented in good faith for the sole purpose of obtaining justice, and not for delay.

Joseph A. Gentiluomo

Joseph A. Gentiluomo, Pro Se

Date: March 3, 2004